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No. 07-60

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 2006

SYLVESTRE ACOSTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the prosecution of Petitioner under 18 U.S.C. §242, the criminal analog to 42 U.S.C. §1983, must fail under this Court's *Parratt- Hudson* doctrine.

2. Whether the "fair warning requirement," correlating to qualified immunity in the civil context, precludes the criminal prosecution of Petitioner for the civil rights counts on which he was indicted.

3. Whether the Government's post-summation adoption of a *Pinkerton* theory of liability constituted constructive amendment or otherwise violated the Fifth Amendment.

4. Whether Petitioner's conviction on Count 9 of the Indictment violated the rule against Double Jeopardy.

5. Whether the "Use" instruction the trial court gave the jury on the 18 U.S.C. §242 counts was plain error in violation of this Court's decision in *Bailey v. United States*, 516 U.S. 137.

6. Whether 18 U.S.C. §241 is a "crime of violence" within the meaning of 18 U.S.C. §924(c)(3).

7. Whether 18 U.S.C. §242 is a "crime of violence" within the meaning of 18 U.S.C. §924(c)(3).

LIST OF ALL PARTIES

The parties to the proceedings below included Paul Skinner and Gerald T. Skinner, both of whom were Defendants in the criminal prosecution in the District Court for the Western District of New York. Mr. Paul Skinner was an Appellant to the United States Court of Appeals for the Second Circuit, and his appeal was heard and decided with Petitioner's.

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OPINIONS DELIVERED BY OTHER COURTS

There are three Opinions issued by the Courts below in this proceeding.

First, the *per curiam* Opinion in *United States of America v. Sylvestre Acosta*, 470 F.3d 132 (2d Cir., 2006).

Second, the Summary Order in *United States of America v. Sylvestre Acosta*, 207 Fed. Appx. 39 (2d Cir., 2006).

Third, the Decision and Order denying Petitioner's Motion For Judgment of Acquittal, reported at 2005 U.S. Dist. LEXIS 43865 (WDNY, 2005).

BASIS FOR JURISDICTION

This Court has jurisdiction to grant Petitioner a writ of certiorari and to hear his appeal from the judgment of the United States Court of Appeals for the Second Circuit, under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Federal Constitutional Provisions

Reprinted on page 39 of the Appendix are the relevant Federal constitutional provisions, which include the Fifth and Fourteenth Amendments to the United States Constitution.

B. Federal Statutory Provisions

Reprinted on pages 40 through 42 of the Appendix are the relevant statutory provisions, which include 28 U.S.C. §§16, 241, 242 and 924(c).

STATEMENT OF THE CASE

Petitioner, Sylvestre Acosta was charged in the Federal District Court for the Western District of New York in a nine count second superseding indictment that charged him with a misdemeanor violation of 18 USC §242 (Count 1), two felony violations of §242 (Counts 2 and 3), a felony violation of 18 USC §241 (Count 5), and three 18 USC §924(c)(1) charges having the aforesaid felonies as predicates.

Following a jury trial, Petitioner was found guilty as charged.

Thereafter, Petitioner moved for a judgment of acquittal. That motion was denied by the District Court.

On May 11th, 2005, the District Court sentenced Petitioner to a total of 45 years and 1 day of incarceration as follows: 1 day on Counts One, Two, Three, and Five, to run concurrently, 5 years on Count Six, to run consecutively, 20 years on Count Seven, to run consecutively, and 20 years on Count Nine, to run consecutively, and further a period of 3 years of supervised release.

A timely Notice of Appeal was filed on May 20th, 2005.

Petitioner, a veteran member of the Buffalo Police Department, was indicted on a theory that he belonged to a rogue group of narcotics officers who were taking illegal "shortcuts", which included lying to Judges, lying to superior officers, illegally searching drug suspects, stealing money, and stealing property. The government's proof, in large part, rested on stories told by convicted drug dealers, drug-addicted street level informants, and Rene Gil, a Buffalo

Police Officer turned multi-kilo drug dealer turned informant.

At trial, three Buffalo City Court Judges testified to the general practice of granting search warrants *in camera* and granting search warrants based upon the written application of the officer applying for the warrant.

Former City Court Judge Andrew C. LoTempio testified that his only recall of Petitioner is that he might have come in with another officer and usually the other officer did the paperwork for the warrant. City Court Judge Thomas P. Franczyk provided no testimony whatsoever concerning Petitioner. Likewise, City Court Judge David M. Manz made no mention of Petitioner.

During part of the time that Petitioner was assigned to narcotics his supervising officer was Captain Edward C. Hempling. Captain Hempling testified that Petitioner was known to be "very active in street arrests" but, he could not remember that Petitioner ever obtained a lot of search warrants.

The only evidence that remotely connected Petitioner to the practice of falsifying information to obtain a warrant came from Rene Gil. The notorious Gil testified that he lied to obtain a search warrant for 16 Center Lane on January 12th, 1998, by using reliability information from one informant and attributing it to another. Gil testified that he lied to obtain a search warrant for 120 Potomac Avenue on February 2nd, 1998, by, once again, attributing the reliability of one informant to another. Further, concerning a search warrant at 395 West Delavan Avenue, Gil testified that once again the application contained fabricated information regarding the informant.

Rene Gil testified that these falsified warrant applications were communicated to other officers during drinking sessions at a bar and at other times even within the confines of the narcotics office. Gil claimed that the conversations concerning these "shortcuts" took place when he was in the SNAP Unit in 1989 until he left narcotics altogether.

Gil was asked: "And can you recall, sir, whether Detective Sly Acosta was ever present during any of these conversations?" He replied: "Yes, he was." This slender thread, provided by a most dubious source, was the only proof during the entire trial that Petitioner knew that search warrants were falsified.

Gil admitted a sordid history of criminal activity, including conspiracy to distribute narcotics, selling 3 to 5 kilograms of cocaine, illegally searching premises, stealing money and things from people, consuming cocaine, pursuing an opportunity to kill an individual to satisfy a drug dealer, laundering money, etc.

Alberto Addarich, reformed drug seller, and reformed drug user, testified that on January 12th, 1998, he was living at 16 Center Lane. He testified that he was returning home with his girlfriend and three-year old daughter when an SUV approached and Jerry Skinner and Rene Gil got out of the car and came up to him. The officers showed him a warrant and they entered his home. The officers placed him in the living room and began to search his home. He testified that after 20 or 25 minutes Gil made a phone call and then other officers began to arrive. He testified that Paul Skinner and Lieutenant Taggert arrived and then 10 or 15 minutes after everybody had arrived Petitioner came on the scene with K-9 dog.

Addarich testified that before the other officers arrived, Gil and Skinner searched a closet that contained an iron box in which he had stashed $3,600.00. The officers found no contraband and he was not arrested. After the officers left, without finding any contraband, he noticed that the money in the iron box was gone.

Gil testified that he and Skinner should have waited for the Lieutenant and the balance of the entry team to arrive before searching 16 Center Lane. Gil testified that he took the $3,600.00 out of the ironing box and put it in the pocket of his coat. Gil testified that he gave Jerry Skinner $1,000.00, he gave Jerry Skinner $800.00 to give Bobby Hill and Paul Skinner, and that after work he met Petitioner at the Buffalo House and gave him $800.00.

Edgardo Berrios, a retired drug dealer and felon convicted on Federal drug charges, and reformed drug addict, testified that on February 2nd, 1998, he was residing at 120 Potomac Avenue. He testified that late in the evening a team of Buffalo Police Officers kicked in his door and upon entry, shot his puppy, a Bull Mastiff. He testified that the officers were Paul Skinner, Gerald Skinner, Petitioner, Rene Gil and too many other officers to remember. Berrios testified that he went to the ground and Gil was on top of him searching his pockets and putting the cuffs on while holding a shot gun to the back of his head. Berrios testified that Gil removed $1,000.00 from his pocket.

Berrios testified that he was locked up as a result of the seizure of drugs from his home. He was released from Court the following day and returned home to find that his computer tower, scanner, printer, television cable box and a cheater box were also missing. Berrios later plead guilty to possession of cocaine and received 5 years of probation as a result of his arrest that night.

Gil testified that the $1,000.00 was split between himself, Petitioner and Jerry Skinner. Gil testified that Petitioner was the evidence control officer during the warrant execution. Gil further testified that he and Petitioner removed the scanner and laser printer from the residence and put it in the trunk of the unmarked police vehicle and later, transferred it out of the unmarked police vehicle into the trunk of Petitioner's vehicle.

Kevin Adams, FBI agent, testified that during a search of Jerry Skinner's residence the cable box and cheater box were found there.

Victor Miller, retired drug dealer, and more recently, a cabinetmaker, testified that on February 3rd, 1998, he resided at 395 West Delavan. He testified that a team of officers broke through the door and he thought he was about to be robbed so he jumped out a window. He heard a gunshot so he got down, was taken into custody and brought back into his apartment. He testified that the officers found drugs and bundles of money that he had stashed in a compartment under his waterbed. He believed he had about $3,000.00 stashed there.

Miller was arrested and released shortly thereafter on bail. When he returned home he found the money, a treadmill, 2 rings and a television missing from his home. He later learned that only a portion of the money taken from his stash was actually reported by the police.

One of the missing rings was described as a gold ring shaped like a lion with rubies in the eyes and a diamond in the mouth. Miller testified that he purchased the ring from Weisberg Jewelers in Main Place Mall. At the time of the search he had owned it a couple of years (approximately 1996). Miller testified that the ring had no special

inscription or other marks that would identify it as belonging to him.

Miller testified that he did plead guilty to possession of cocaine and received a sentence of 2 years. However, he also testified that the police failed to find an additional 17 ounces of cocaine, which he had "someone dispose of" while he was still in jail.

Gil testified that he was part of the team that executed the search warrant at Miller's home. Petitioner was the designated evidence control officer for that search. Gil testified that when he found the bundles of money he handed them off to Jerry Skinner. Gil testified that the officers completed a P-10 form to reflect that $1,392.00 was seized from the residence. Gil further testified that that was not the entire amount they seized and that later, Jerry Skinner gave him $1,000.00 of which he gave $500.00 to Petitioner.

Charles Argento, Special Agent for the Internal Revenue Service, Criminal Investigation Division, testified that on August 28th, 2001, he was part of a search team at Petitioner's home. Argento testified he found a canvas bag in the garage that contained a Salems Light cigarette pack that held jewelry. Argento testified there were 7 rings, one of which he recalled was a lion's headed ring. The lion's headed ring was later marked and received as government's exhibit 766A. This ring was shown to Miller and he identified it as his own.

Johnny Reed, convicted drug dealer was brought from the Wyoming Correctional Facility, a New York State Prison, to testify at trial. He testified that he was appearing in Court in exchange for a letter of recommendation from the U.S. Attorney to the New York State Parole Board. Reed testified that on December 27th, 1997, he was living at 521

Walden Avenue when his house was raided by officers Darnyl Parker, Gerald Skinner, Paul Skinner, Petitioner and Rene Gil.

Reed testified that four and a half ounces of crack cocaine was seized and approximately $20,000.00 in cash. The P-10 form for the currency seized stated that $2,226.00 was seized. He was arrested and later released. Several months after the raid Reed testified that he was stopped by Officers Darnyl Parker, Gerald Skinner, Paul Skinner and Petitioner . He testified that he was punched by Gerald Skinner and accused of stalling them on information they wanted him to supply. During this event he testified that Petitioner was seated in the front seat of an unmarked police car.

Interestingly, Gil was not sure that Petitioner was present at this raid and provided no information whatsoever as to the $18,000.00 approximately that Reed claimed was taken.

More to the point, and completely contrary to Reed's version of the event and Gil's equivocal memory of the event, the United States Attorney stipulated at trial that ***payroll records of the Buffalo Police Department show that neither Paul Skinner nor Sylvestre Acosta were on duty on December 27th, 1997.*** (emphasis added)

Carmelo Rosa, testified that in the summer of 1994, he was working on home remodeling at 262 7th Street. He was carrying $1,500.00 that belonged to the homeowner to pick up supplies. On his way he was stopped by a marked Buffalo patrol car and questioned by Officer Santiago. He testified during the conversation another unmarked vehicle pulled up driven by Petitioner. Petitioner was attired in civilian clothes.

Rosa testified that Petitioner told him to exit the vehicle and he then patted him down. Rosa testified that Petitioner took the $1,500.00 and told him that if he wanted the money he would have to come to Central Booking and bring a receipt for the money. Rosa testified he went to Central Booking the next day and spoke to Petitioner and presented a receipt to have the money returned. He testified that Petitioner told him he would need a lawyer to get the money back. Rosa spoke to a lawyer but was never able to get the money back.

Buffalo Police Officer John Santiago testified that he had no recollection of the traffic stop with Rosa. Further, he had no recollection of Petitioner arriving at the scene and taking any money from Rosa. Santiago testified that on November 15th, 2004, just two weeks prior to trial, he had a conversation with Petitioner at the B-District stationhouse. Santiago testified that he and Petitioner discussed the traffic stop and he told Petitioner he had no memory of it.

Santiago testified that Petitioner told him that he did search Rosa and took $1,500.00 from him. Santiago testified that Petitioner asked him if he recalled that Petitioner gave him the $1,500.00 to put in property, by way of a P-10 form.

No eyewitness appeared at trial and testified that Petitioner used, carried, displayed, or threatened the use of a firearm at any time during the events described at trial.

Instead, the government relied on conflicting evidence as to what constituted standard protocol in the narcotics division.

Lt. Thomas Rinaldo further testified that there was no usual practice of the narcotics bureau for the officers to have

their service revolvers drawn when a search warrant was executed.

Detective Lawrence Sadlocha testified that he was part of the entry team at 16 Center Lane. Sadlocha testified that Petitioner arrived a while after the entry team and he showed up with a K-9 dog. Sadlocha, a seasoned veteran of the Buffalo Police Department, did not provide any testimony that Petitioner was armed on this occasion.

Sadlocha further testified that he was part of the entry team at 120 Potomac Avenue. Sadlocha testified that Petitioner was the evidence control officer at the scene. At no time did Sadlocha provide any testimony that he saw that Petitioner was armed at the scene.

Lastly, Sadlocha was present at the execution of the warrant at 395 West Delavan. Likewise, he did not testify that Petitioner was armed on that occasion.

Finally, on this very critical aspect of proof, not even Gil provided one word of testimony to support the claim that Petitioner was actually armed during any of these events.

The only live witness called by the defense was Edward Wicks, a forty-one year employee of Weisberg Jewelers. Wicks examined the lion's head ring, Government Exhibit 766A, and testified that Weisberg Jewelers never sold the ring.

After his judgment of conviction, Petitioner timely appealed pursuant to 28 U.S.C. §1291. The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction, issuing a *per curiam* opinion and, on some issues, a Summary Order.

ARGUMENT

POINT 1

THE PROSECUTION OF PETITIONER UNDER 18 U.S.C. §242, THE CRIMINAL ANALOG TO 42 U.S.C. §1983, MUST FAIL UNDER THIS COURT'S *PARRATT-HUDSON* DOCTRINE

18 U.S.C. §242 is the criminal counterpart of 42 U.S.C. §1983. *U.S. v. Wiseman*, 445 F.2d 792, 797 (2d Cir., 1971). Precedent on the civil statute (§1983) bears with equal weight on the criminal statute. See, e.g., *Stokes v. Northwestern Memorial Hospital*, 1989 U.S. Dist. LEXIS 8543 (ND Ill., 1989).

There was a time when a state actor acting randomly and without authorization may have been deemed to have committed a Fourteenth Amendment procedural due process violation when intentionally depriving persons of their property.

However, it is respectfully submitted this changed when this Court held that an unauthorized, intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. This holding is an extension of *Parratt v. Taylor*, 451 U.S. 527 (1981):

> . . . Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural

> requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.

Hudson v. Palmer, 468 U.S. 517, 533 (1984).

The focus on whether a Fourteenth Amendment procedural due process violation has occurred must be on whether the state could have foreseen the deprivation and therefore afforded predeprivation due process. The focus is **not** on whether the individual committing the deprivation could have provided predeprivation process:

> Respondent presses two arguments that require at least brief comment. First, he contends that, because an agent of the state who intends to deprive a person of his property "can provide predeprivation process, then as a matter of due process he must do so." Brief for Respondent and Cross-Petitioner 8 (emphasis in original). This argument reflects a fundamental misunderstanding of *Parratt*. There we held that postdeprivation procedures satisfy due process because the *state* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

Hudson v. Palmer, supra, 468 U.S. at 534.

Under any point of view, the conduct for which Acosta was convicted must be deemed "random and unauthorized." The jury instructions were oblivious to this. The court addressed the civil rights at stake in the §242 counts, identifying them as the Fourth Amendment and the Fourteenth Amendment. As to the Fourteenth Amendment, the court made crystal clear that it was a procedural due process right at issue:

> The 14th Amendment prohibits a police officer, while acting under color of law, from taking money or property from an individual and then converting or stealing the money or property for his own use. The person with whom the police officer takes the money or property is entitled under the 14th Amendment to certain procedural protections such as a hearing before a judge before the money or property may be permanently taken away or forfeited to the Government.
>
> Under no circumstances can a police officer keep property seized under color of law for his own personal use without following these procedural protections. This constitutional right to due process is protected. . .

As the facts presented in the Statement of the Case above demonstrate, there was little evidence that Acosta obtained, or conspired to obtain, search warrants without reasonable cause and based upon false information. The bulk of the evidence was that Acosta accepted a share of proceeds of property that fellow officers stole when conducting illegal searches.

This instruction is impossible to square with *Hudson v. Palmer*. Acosta requests that this Court extend the

Parratt-Hudson doctrine to 18U.S.C. §242, which is the counterpart to 42 U.S.C. §1983.

To state Acosta's contention another way, in light of the instruction given to the jury, it is impossible to determine if Acosta was convicted for a civil rights violation or, instead, for theft that the Court erroneously characterized as a civil rights violation.

The case of *Mom's Incorporated v. Willman* addresses the constitutional consequences of a search by federal and state agents that, *inter alia,* involved the theft of property. One of the plaintiffs alleged that a watch was stolen by IRS and state agents from a safe in his residence. A civil rights action under 42 USC §1983 was brought, seeking recompense for this and other legal wrongs. The court dismissed the suit, invoking *Hudson v. Palmer*, stating:

> We next considered Colaprete's claim that Petitioner violated his Fourth, Fifth and Fourteenth Amendment rights when they failed to return a watch that he kept inside his safe that was seized from his home. We hold that the theft of Colaprete's watch violated his Fourth Amendment rights but that those rights were not clearly established when the theft allegedly occurred.
>
> We note at the outset that no Fifth or Fourteenth Amendment due process claim will lie here because adequate mechanisms exist for Colaprete to recover the value of his watch.

Mom's, Inc. v. Willman, 109 Fed. Appx. 629, 636, 2004 U.S. App. LEXIS 20675, pp. 14-15 (4th Cir., 2004).

The court then succinctly put it as follows:

> [Q]ualified immunity exists to protect those officers who reasonably believe that their actions do not violate federal law." *Doe v. Broderick*, 225 F.3d 440, 453 (4th Cir. 2000). *If either Petitioner stole Colaprete's watch, he or she should have recognized that this was a tort, a crime, and even a sin, but he had no clear notice that this action violated the United States Constitution.* Accordingly, the district court erred in denying summary judgment on grounds of qualified immunity.

Mom's, Inc., supra, 109 Fed. App. at 637 (emphasis added).

In a case alleging a §1983 claim for a police officer's theft of money from the plaintiff's wallet incidental to an allegedly wrongful arrest, it has been held that *Hudson v. Palmer* precludes the claim. *Davis v. Schifone*, 185 F.Supp. 2d 95, 101-102 (D. Ma., 2002). Within the Second Circuit, a similar claim was made. Plaintiff claimed his automobile was improperly seized by officers of the New York City Taxi and Limousine Commission and, *inter alia*, that various valuable possessions were removed from it. Citing *Hudson v. Palmer*, and noting postdeprivation remedies available under New York law, the court dismissed the procedural due process claim. *Nicoletti v. NYC Taxi and Limousine Commission*, 1999 U.S. Dist. LEXIS 8025 (SDNY, 1999).

It is certainly plausible that the jury convicted Acosta, in light of the instructions it received from the trial judge, for having stolen (or having conspired to steal) property. While it is possible that a jury convicted Acosta for having obtained (or conspired to obtain) search warrants without probable cause, the evidence was distinctly weaker. Thus, if granted a writ of certiorari, Acosta will ask this

Court to invoke the "rule of the *Stromberg* case." That is, if one of the prongs upon which a conviction may hang is legally insufficient, and it is impossible to tell which the jury selected, the conviction must be reversed. *Bachellar v. Maryland*, 397 U.S. 564, 570-571 (1970); *Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Street v. New York*, 394 U.S. 576, 585-588 (1969).

In the alternative, it is requested that this court recognize "good faith immunity" and dismiss counts 1, 2, 3 & 4 of the indictment. It is well settled that the principles respecting good faith immunity in civil cases correspond to "good faith immunity" or the "fair warning requirement" applicable in the criminal context. See *United States v. Lanier*, 520 U.S. 259, 270 (1997). In *Lanier*, the court discussed qualified immunity "in the civil sphere", and stated:

> ***The fact that one has a civil and the other a*** criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.

Ibid.

POINT 2

THE GOVERNMENT'S POST-SUMMATION ADOPTION OF A *PINKERTON* THEORY OF LIABILITY CONSTITUTED CONSTRUCTIVE AMENDMENT OR OTHERWISE VIOLATED THE FIFTH AMENDMENT

The substantive counts of the indictment against Acosta contain no suggestion of *Pinkerton* liability being charged. They assert that Acosta (and another) performed unlawful acts, including participation in a conspiracy, but did not assert that co-conspirators of Acosta committed unlawful acts in furtherance of a conspiracy.

Going into the trial, Acosta had no notice that he was being tried for the acts of co-conspirators, allegedly made in furtherance of a conspiracy in which Acosta was a partner. This lack of notice is evident in the record. The indictment contains no "*Pinkerton* counts," alleging Acosta's liability for the offenses of others. The government's opening statement contains no hint that a claim of *Pinkerton*-style vicarious liability was at hand. For example, the prosecutor discusses the conspiracy count; there is no claim or suggestion that the government seeks to hold Acosta liable for the criminal acts of others made in furtherance of the conspiracy. With respect to count two, the prosecutor told the jury in his opening statement that Acosta participated in an unlawful search of premises known as 120 Potomac, and that Acosta was present during the search and stole money from residents, or, at least, took a conspirator's share of stolen money. As to count 3, the prosecutor likewise asserted that Acosta participated in an unlawful search and "split up" property stolen during the search.

The Court's preliminary instructions explained counts 2 and 3 of the indictment to the jury. After reading the counts to the jury, the Court went on to explain what elements "the Government must establish beyond a reasonable doubt:"

- ". . . the *named* defendant acted under color of law"

- ". . .the *defendant* deprived . . . a person . . . of a right"

- ". . .the *defendant* acted willfully"

- ". . .the *defendant* used or attempted to use or threatened to use a dangerous weapon . . ."

(emphasis added).

The "government's trial memorandum", makes no mention of the *Pinkerton* decision or *Pinkerton*- style liability, either expressly or implicitly.

Thus, the government's trial memorandum, the Court's opening instructions, and the government's opening statement, uniformly describe counts 2 and 3 of the indictment as pertaining to Acosta's alleged wrongful acts, not Acosta's liability under a *Pinkerton*-style theory for the wrongful acts of co-conspirators. Even through the morning of the last day of the trial, when the Government summed up to the jury, *Pinkerton*-style liability went unmentioned. The prosecutor, in describing the evidence, expressly and repeatedly argued that Acosta committed the acts described in counts 2 and 3 of the indictment, not that he was liable for other persons' commission of those acts. When the prosecutor wound up, describing legal issues, no mention was made of vicarious liability.

It was not until the penultimate phase of the trial, i.e., the jury charge, that the government switched gears.

Because Counts 2 and 3 of the indictment are not "*Pinkerton* counts," and because *Pinkerton*-style liability was never asserted until the court gave a *Pinkerton* charge,

the *Pinkerton* charge constituted a constructive amendment of the indictment as well as a prejudicial and substantial variance in proof.

In the case of *United States v. Pedigo*, the 7th Circuit Court of Appeals addressed exactly this issue. *Pedigo* alleged impermissible constructive amendment of count 3 of the indictment upon which he was convicted. Count 3 asserted that he used a firearm in violation of 18 USC §924(c)(1) in relation to a drug trafficking crime alleged in count 2 of the indictment. Count 2 of the indictment alleged that Pedigo knowingly possessed marijuhana. As well, the first count of the indictment alleged Pedigo's participation in a conspiracy to distribute in excess of 100 kg of marijuhana.

The prosecutor and defense counsel agreed to a *Pinkerton* charge, which the court gave to the jury, to the effect that if Pedigo were guilty of the count 1 conspiracy, he could be held liable for the third, §924(c) count of the indictment even if it was his fellow conspirator, and not Pedigo, that used the firearm referred to in that count of the indictment. *U.S. v. Pedigo*, 12 F.3d 618, 629-30 (7th Cir., 1993).

On appeal, the 7th Circuit Court of Appeals performed its analysis, referencing the Fifth Amendment of the United States Constitution, which guarantees that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

Ibid. at 631. The court went on to quote this apt reasoning:

> "It is the exclusive prerogative of the grand jury finally to determine the charges, and once it has

> done so neither a prosecutor nor a judge can 'charge the charging part of an indictment to suit [his or her] own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes.'" *United States v. Leichtnam*, 948 F.2d 370, 375-76 (7th Cir. 1991) (quoting *Ex parte Bain*, 121 U.S. 1, 10, 30 L.Ed. 849, S.Ct. 781 (1887)).

U.S. v. Pedigo, supra, 12 F.3d at 631. The court discussed two exceptions inapplicable to this case, and concluded:

> . . . However, any broadening of an indictment, so that a trial jury is presented with more or different offenses or theories of conviction than charged by the grand jury is fatal. [948 F.2d] at 377. It is reversible per se. *Id.* Therefore, if an amendment occurred, the plain error standard of review will not save the conviction.

Ibid.. Since the *Pedigo* decision, the 7th Circuit has retreated from the *Pedigo* holding only to the extent that it permits "plain error review," rather than finding broadening of an indictment to be "reversible *per se*." See, e.g., *U.S. v. Duran*, 407 F.3d 828, 843 (7th Cir., 2004).

Of note, counts 6, 7 & 9 of the indictment, the §924(c) counts, allege Acosta used and carried firearms during and in relation to the commission of counts 2, 3 & 5 of the indictment. The *Pinkerton* charge allowed Acosta to be convicted of other persons' conduct in commission of counts 2, 3 & 5. Logically, the jury may well have found that Acosta used and carried a firearm as a "tool of the trade" while *other persons* committed the substantive crimes described in counts 2 & 3. Quite possibly, the jury never reached the question of Acosta's personal use or carriage of

a weapon, using *Pinkerton* principles defined that other conspirators did, thereby rendering Acosta guilty. In summary, the imposition of a *Pinkerton* charge, creating a theory of liability after the proof was closed, premised on elements (e.g., that co-conspirators committed the substantive offenses in furtherance of the conspiracy, even though the grand jury never found or enunciated such element) not found in the indictment but that need to be proven beyond a reasonable doubt, constituted an impermissible constructive amendment of the indictment. Therefore, Acosta's conviction on counts 1, 2 & 3 of the indictment should be dismissed.

POINT 3

PETITIONER'S CONVICTION ON COUNT 9 OF THE INDICTMENT VIOLATED THE RULE AGAINST DOUBLE JEOPARDY

Acosta was convicted on count 9 of the indictment, alleging an 18 USC §924(c) violation relating to the predicate offense of 18 USC §241. Acosta was sentenced to 20 years for his conviction on count 9.

A jury may well have found that Acosta used or carried a firearm in the commission of the predicate offenses described in counts 2 & 3 of the indictment, that relate to the §924(c) counts numbered 6 & 7 in the indictment, *and* that those two predicate, substantive offenses were in furtherance of the conspiracy for which he was convicted on count 5 of the indictment, and, therefore, that the use and carriage of a firearm in the course of committing the counts 2 & 3 offenses also constituted the use and carriage of a firearm during the commission of count 5 of the indictment. Thus, Acosta was convicted of a second §924(c) violation for the use and carriage of a firearm on the same days, at the same

places, and under the same circumstances, for which he was convicted and sentenced.

This violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The Double Jeopardy Clause provides three separate constitutional protections. First, it protects against a second prosecution for the same offense after acquittal. Second, it protects against a second prosecution for the same offense after conviction. Third, it protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969).

Acosta respectfully submits that he has been subjected to double jeopardy, that is, that he has lost the third protection described in the *Pearce* case above.

POINT 4

THE "USE" INSTRUCTION THE TRIAL COURT GAVE THE JURY ON THE 18 U.S.C. §242 COUNTS WAS PLAIN ERROR IN VIOLATION OF THIS COURT'S DECISION IN *BAILEY V. UNITED STATES*, 516 U.S. 137 (1995)

The district court, apparently without objection from Acosta's counsel, adopted the government's proposed jury charge respecting the "use, attempted use and threatened use of a dangerous weapon" element of the two felony 18 USC §242 counts.

As a result, two radically different definitions of the word "use" were presented to the jury by the court.

With respect to counts 2 & 3 of the indictment, which are the felony §242 counts, the court instructed the jury as follows:

> The fourth element, this is the final element. The fourth element that the Government must prove beyond a reasonable doubt is that the defendant used, or attempted to use, or threatened to use the use [sic] of a dangerous weapon during the course of acts of depriving a constitutional right. A dangerous weapon means any object or instrumentality that has the potential to inflict serious bodily harm. *To use or attempt to use or threaten the use of a dangerous weapon means having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right.* . . .

The issue of "use" appears a second time in the jury instructions, in the context of the §924(c) counts. The Court's description of "use" reflects the Supreme Court's decision in *Bailey v. U.S.*, 516 U.S. 137 (1995) and the responsive amendment to 18 U.S.C. §924(c).

In *Bailey*, the Supreme Court held that the definition of "use" in §924(c)(1) was narrower than the definition adopted by the Circuit Courts of Appeals, which is essentially the same that the Government convinced the district court in this case to adopt as the definition of "use" within the meaning of §241.

In *Bailey*, the court noted that the point of beginning in statutory interpretation is the language of the statute. 516 U.S. at 144-5. What the *Bailey* court rejected is very close to what the court below adopted as the definition of "use" in this case, at the behest of the Government. This

Court found a proximity and accessibility standard unacceptable because it provides "almost no limitation on the kind of possession that would be criminalized." *Ibid.* at 143-4. This Court also noted that the §924(c) statute utilized the words "use" and "carry" and a definition of "use" should be adopted that does not render the word "carry" superfluous. Therefore, this Court adopted an "active employment" definition of "use."

As a result of the erroneous instruction, the jury was invited to convict Acosta on the §242 count for carrying – but not actively employing – a firearm. Once that conviction was obtained, the jury was then allowed to convict Acosta on corresponding §924(c) counts, again for carrying a firearm. It is impossible to determine if the jury unanimously found that Acosta "actively employed" a firearm, or merely carried one. If the latter, the conviction on the §242 counts would have to be reversed, which would remove the predicates needed to sustain conviction on the corresponding §924(c) counts.

POINT 5

18 U.S.C. §241 IS NOT A "CRIME OF VIOLENCE" WITHIN THE MEANING OF 18 U.S.C. §924(c)(3)

18 U.S.C. §924(c) provides for a sentence enhancement if "any person who during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. §924(c)(1)(A). As defined, a §924(c) violation requires as an element, an underlying offense that is a "crime of violence." *See United States v. Desena*, 287 F.3d 170, 180 (2d Cir. 2002). A "crime of violence" is defined by the statute as:

> [A]n offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(c)(3) (2005). Under *Leocal v. Ashcroft,* whether an offense is a "crime of violence," is determined by "look[ing] to the elements and the nature of the offense of the conviction, rather than to the particular facts relating to [the] petitioner's crime." Leocal v. Ashcroft, 125 S. Ct. 377, 381 (2004). Leocal v. Ashcroft analyzed whether an offense was a "crime of violence" under 18 U.S.C. §16, which closely matches the definition in 18 U.S.C. §924(c)(3).

18 U.S.C. §241 prohibits a conspiracy to deprive any person of a right protected under the U.S. Constitution or federal law. Accordingly, the elements that must be shown to establish a violation under 18 U.S.C. §241 are (1) the existence of a conspiracy, and (2) that the purpose of the conspiracy was to injure, oppress, threaten or intimidate a United States citizen in the free exercise or enjoyment of a constitutional or federal right.

While 18 U.S.C. §241 uses words such as injure, oppress, threaten, or intimidate, these words in the context of 18 U.S.C. §241 do not necessarily denote the use, attempted use or threatened use of physical force. In *Anderson v. United States*, a case involving a prosecution under 18 U.S.C. §241 for elections fraud, the Court held that "to the extent that the importance of [a voter's] vote is nullified,

wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States." *Anderson v. United States*, 417 U.S. 211, 226 (1974).

Similarly 18 U.S.C. §241 cannot be a "crime of violence" under 18 U.S.C. §924(c)(3)(B) because not all conduct covered under 18 U.S.C. §241 involves even a remote possibility that physical force may be used. 18 U.S.C. §924(c)(3)(B) "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 125 S. Ct. at 383.

The U.S. Supreme Court, in *United States v. Mosley*, has explicitly stated that 18 U.S.C. §241 is not limited to conspiracies involving a substantial risk that physical force may be used in the course of committing the offense, holding that the statute, "being devoted . . . to the protection of all federal rights from conspiracies against them, naturally did not confine itself to conspiracies contemplating violence." *United States v. Mosley*, 238 U.S. 383, 387-88 (1915) (holding based on §19, a precursor of 18 U.S.C. §241 with identical language).

The numerous election fraud cases further illustrate that a conviction under 18 U.S.C. §241 does not necessarily involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. *See United States v. Mosley*, 238 U.S. at 388; *Anderson v. United States*, 417 U.S. at 228. The conduct in *Anderson*, while reprehensible, was performed surreptitiously, in a non-violent manner and without any direct contact with those injured in their federal right to vote. Similarly, in *United States v. Classic*, the illegal, but peaceful conduct of willfully altering, and falsely counting

and certifying ballots of voters dispels the notion that a substantial risk that physical force may be used naturally flows from a violation of 18 USC §241. *United States v. Classic*, 313 U.S. 299, 307 (1941). Nor would the potential for an occurrence of violence likely arise in the course of committing that offense.

POINT 6

18 U.S.C. §242 IS NOT A "CRIME OF VIOLENCE" WITHIN THE MEANING OF 18 U.S.C. §924(c)(3)

18 U.S.C. §242 prohibits the willful deprivation of right and privileges secured and protected by the U.S. Constitution and federal law, while acting under color of law. There has been some debate about whether 18 U.S.C. §242 defined a single crime with three different maximum penalties or several distinct offenses.

If 18 U.S.C. §242 merely defines one offense with three different sentencing factors, then the statute in question cannot be a "crime of violence" under 18 U.S.C. §924(c)(3). It encompasses non-violent conduct, as well as inaction so long as there is a deprivation of one's civil rights, committed willfully and under color of law. *See Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943). Therefore, 18 U.S.C. §242 viewed as a single offense with different sentencing enhancements cannot be a "crime of violence" under either 18 U.S.C. §924(c)(3)(A) or 18 U.S.C. §924(c)(3)(B).

Given the fact that 18 U.S.C. §242 encompasses diverse classes of criminal offenses, 18 U.S.C. §242 may be a divisible statute, because "it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departure from

past practice." *Jones v. United States*, 526 U.S. at 234. In *United States v. Williams*, 18 U.S.C. § 242 was held to define three separate offenses. *United States v. Williams*, 343 F.3d 423, 433-34 (5th Cir. 2003).

Accordingly, 18 U.S.C. §242 may be divisible into three distinct and separate offenses. The first offense as defined in the first clause contains the following basic elements: (1) a willful (2) deprivation of a federal or constitutional right (3) under color of law. The second offense, as defined encompasses elements of the first clause and includes an additional element of resultant bodily injury or the use, attempted use, or threatened use of a dangerous weapon. The final offense under the third clause of 18 USC §242 encompasses the elements of the first clause and an additional element of resultant death or inclusion of certain enumerated felonies.

Therefore, in analyzing the specific offense defined under clauses one and two of 18 U.S.C. §242, the basic elements are: (1) a willful (2) deprivation of a Constitutional or federal right (3) under color of law (4) that results in bodily injury or includes the use, attempted use or threatened use of a dangerous weapon. The first three elements do not require that use of force be an element of the offense and therefore cannot constitute a "crime of violence" under 18 U.S.C. §924(c)(3)(A). *See Chrzanoski v. Ashcroft*, 327 F.3d at 191; *See also United States v. Ramey*, 336 F.2d 512, 514 (4th Cir. 1964) (holding that neither threat nor violence is a necessary ingredient for a conviction under 18 USC. §242).

The additional element of resultant bodily injury or inclusion of the use, attempted use or threatened use of a dangerous weapon also does not transform the offense into a "crime of violence" as defined in 18 USC §924(c)(3)(A) or 18 USC §924(c)(3)(B). The offense still encompasses a

wide range of conduct including non-violent conduct and inaction. *See United States v. Reese*, 2 F.3d 870, 890 (9th Cir. 1993). While resulting bodily injury is a necessary element of this offense, "there are many crimes that involve a substantial risk of injury, but do not involve the use of force" as an element of the offense. *Dalton v. Ashcroft*, 257 F.3d at 207. Therefore one cannot conclude that use of physical force is a necessary fact for an 18 USC §242 conviction involving resultant bodily injury or use of a weapon to satisfy the requirements of 18 USC §924(c)(3)(A).

Similarly, one cannot conclude that 18 USC §242, by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense necessary to satisfy 18 USC §924(c)(3)(B). There is a "logical fallacy inherent in reasoning that simply because all conduct involving a risk of the use of force also involves a risk of injury then the converse must also be true." *Id.* Some criminal conduct falling under the definition of 18 U.S.C. §242 "may involve a substantial risk of injury or harm without at the same time involving the use of physical force" or the substantial risk that physical force may be used. *Id.* This is especially true in light of the fact that the resultant bodily injury element merely requires a showing of proximate causation. *See United States v. Hayes*, 589 F.2d 811, 820 (5th Cir. 1979).

Even if one were to examine the inclusion of use, attempted use or threatened use of a dangerous weapon portion of the offense alone, one still could not conclude that a 18 U.S.C. §242 offense is a "crime of violence" under either 18 U.S.C. §924(c)(3)(A) or 18 U.S.C. §924(c)(3)(B). The "use of a dangerous weapon" element of an offense cannot transform an offense that is not a "crime of violence"

into a crime of violence." To do so, would render the need for a predicate "crime of violence" offense under 18 U.S.C. §924(c)(1)(A) superfluous. *See Connecticut v. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (noting that courts should disfavor interpretations that render statutory language superfluous). There would be no need to find that there was a predicate "crime of violence" offense. Rather the mere elementary finding that an offense involved the use of a weapon would automatically transform it into a "crime of violence." However, the need to find that a weapon was used in relation to a crime of violence is telling. The separation of the element of using a weapon from the "crime of violence" element must lead one to reasonably conclude that the element of using of a weapon cannot transform an offense into a "crime of violence" for the purposes of 18 U.S.C. §924(c)(1)(A).

Additionally, the term "use" is broadly defined and expansive enough to include situations when the dangerous weapon is not actively employed as a weapon. *Smith v. United States*, 508 U.S. 223, 229 (1993) (holding that bartering a firearm in return for drugs constituted use of a firearm). To fall within the definition of use, one must merely actively employ the dangerous weapon. *Bailey v. United States*, 516 U.S. 137, 148 (1995). "The active-employment understanding of use [can] include brandishing, displaying, bartering [and] striking with" a weapon. *Id.* "Use" can also include a "reference to the [weapon] calculated to bring about a change in the circumstances of the . . . offense" or even the "obvious and forceful presence of [that weapon] on a table." *Id.* Therefore use, attempted use, or threatened use of a dangerous weapon cannot constitute the use, attempted use or threatened use of physical force necessary to conclude that the offense is a "crime of violence under 18 USC §924(c)(3)(A). Similarly, the wide breadth of the term "use" encompasses conduct that

cannot by its nature, involve a substantial risk that physical force may be used in the commission of an 18 USC §242 offense. Consequently, the additional element of using, attempting to use or threatening to use a dangerous weapon cannot classify an 18 U.S.C. §242 offense as a "crime of violence" because the merely use of a weapon fails to satisfy the requirements of 18 U.S.C. §924(c)(3)(B).

Therefore, given that an 18 U.S.C. §242 offense cannot be a "crime of violence" for the purposes of 18 USC §924(c)(1)(A), Counts 6 and 7 must be dismissed because a "crime of violence" predicate offense is not present, as required to sustain a charge under 18 USC §924(c).

CONCLUSION

The Petition for a writ of certiorari should be granted.

DATED: Buffalo, New York
May 14, 2007

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: April 19, 2006) Decided: November 30, 2006)

Docket Nos. 05-3346-cr(L), 05-3416-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

v.

SYLVESTRE ACOSTA, also known as SLY ACOSTA, and PAUL SKINNER,

Defendants-Appellants,

GERALD T. SKINNER,

Defendant.

Before: JACOBS, *Chief Judge,* B.D. PARKER, *Circuit Judge,* and OBERDORFER, *District Judge.**

Defendants-Appellants appeal from judgments of conviction entered by the United States District Court for the Western District of New York (Richard J. Arcara, *Chief District Judge*). They contend, among other things, that 18 U.S.C. §§241 and 242 are not crimes of violence for purposes of 18 U.S.C. §924(c).

AFFIRMED.

WAN J. KIM, Assistant Attorney General (Jessica Dunsay Silver, Angela M. Miller, *on the brief*), Department of Justice, Washington, DC, *for Appellee.*

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*The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

DAVID J. SEEGER (Leigh E. Anderson, *on the brief*), Buffalo, NY, *for Defendant-Appellant Sylvestre Acosta.*

PATRICK J. BROWN, LoTempio & Brown, P.C., Buffalo, NY, *for Defendant-Appellant Paul Skinner*

PER CURIAM:

Sylvestre Acosta and Paul Skinner, both former members of the Buffalo New York Police Department, appeal from judgments of conviction entered in the United States District Court for the Western District of New York (Richard J. Arcara, *Chief District Judge*). Both were convicted of violating civil rights under color of law and conspiracy to do so in violation of 18 U.S.C. §§242 and 241, and carrying a firearm during the commission of a crime of violence in violation of 18 U.S.C. §924(c). The convictions

stem from their falsification of search warrants, armed robbery of money and property from suspected drug dealers, and repeated use of violent, intimidating tactics against suspects and informants. Acosta was primarily sentenced to forty-five years and one day of imprisonment and Skinner was primarily sentenced to ninety-three months' imprisonment. The Appellants raise a host of challenges to their convictions, the majority of which are addressed in a companion summary order filed today. We write separately to reject the claim that §§242 and 241 are not crimes of violence for purposes of §924(c).

BACKGROUND

Since 1989, Acosta and Skinner, along with several others were police officers assigned to the Buffalo Police Department's "Maryland Street Detail" (the MSD), a unit formed to combat drug traffic in the lower west side of Buffalo. The MSD was later absorbed into various other street crime units of the Buffalo police, but this core group continued to work together throughout the 1990s. The testimony at trial demonstrated that during this period, they engaged in rogue, vigilante-style tactics worthy of a television drama. The government's evidence at trial established that Skinner, Acosta, and their co-conspirators "tossed" suspects (*i.e.,* searched them in violation of their constitutional rights), planted drugs, and stole money, computers, electronics, weapons, and other items from suspected drug dealers. That evidence also showed that they falsified information in search warrant applications and covered up the practice with falsified official reports, and that, while armed, they engaged in a wide variety of violent and intimidating behavior with respect to informants and suspects.

DISCUSSION

This per curiam opinion addresses Acosta's claim that his §924(c) conviction should be reversed because §242 is not a crime of violence, and Acosta's and Skinner's claims that their §924(c) convictions should be reversed because §241 also is not a crime of violence.

Section 924(c) states in relevant part:

> (1)(A) [A]ny person who, during and in relation to any crime of violence ... (including a crime of violence . . . that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . . [be subject to certain minimum terms of imprisonment] . . . .
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and – has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §924(c).

In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court considered whether an offense is a "crime of violence" under 18 U.S.C. §16, a provision which contains virtually identical language to §924(c)(3).[1] The Supreme Court instructed reviewing courts "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Id.* at 7. We too have employed this "categorical approach" when determining whether a particular offense is a crime of violence under §16. *See, e.g., Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 166 (2d Cir. 2006); *Jobson v. Ashcroft*, 326 F.3d 367, 371 (2d Cir. 2003); *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001); *Ming Lam Sui v. INS*, 250 F.3d 105, 117-18 (2d Cir. 2001).

Under this categorical approach, we focus on the intrinsic nature of the offense rather than on the circumstances of the particular crime. Consequently, only the minimum criminal conduct necessary for conviction under a particular statute is relevant. *Vargas-Sarmiento*, 448 F.3d at 166; *see also Ming Lam Sui*, 250 F.3d at 117-18 (noting that the reviewing court "cannot go behind the offense as it was charged to reach [its] own determination as to whether the underlying facts amount to one of the enumerated crimes"((citation omitted). Applying this categorical approach, we now consider whether §§242 and

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[1] Section 16 defines a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §16.

241 are crimes of violence for purposes of §924(c). *Cf. United States v. Patino*, 962 F.2d 262, 267 (2d Cir. 1992) (applying principles developed under the Bail Reform Act, 18 U.S.C. §3156(a)(4), to the question of whether a crime is a "crime of violence" under §924(c(3) because the definition of "crime of violence" in the two statutes is "virtually identical").

We first turn to Acosta's contention that he was improperly convicted under §924(c), because §242 does not constitute a crime of violence. We review this claim for plain error because it was not raised before the district court. *See United States v. Carr,* 424 F.3d 213,219 (2d Cir. 2005).

Section 242 provides in part:

> [1] Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both; and [2] if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and [3] if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of

> years or for life, or both, or may be sentenced to death.

18 U.S.C. §242. Acosta was charged under the second clause of §242. Since this clause "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," it necessarily qualifies as a crime of violence under §924(c)(3)(A). The use of a gun by a police officer to rob and intimidate suspected drug dealers, therefore, violates §242's prohibition on "the use, attempted use, or threatened use of a dangerous weapon" in the course of willfully depriving a person of his constitutional rights under color of law. That use also subjects the offender to enhanced punishment for carrying a firearm "during and in relation to any crime of violence" under §924(c).[2] Consequently, no error occurred when Acosta's conviction under the second clause of §242 served as a predicate crime of violence supporting his conviction under §924(c). In

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[2] Our conclusion that Acosta's conduct was properly found to have violated the second clause of §242, and as such constitutes a predicate crime of violence under §924(c), should not be misunderstood to imply that any conduct by a police officer that violates constitutional rights is subject to the same enhanced penalties. We express no opinion as to whether conduct that is prohibited by the first clause of §242, but does not involve "bodily injury" or "the use, attempted use, or threatened use of a dangerous weapon," necessarily qualifies as a crime of violence under either §924(c)(3)(A) or (B). Moreover, we note that an on-duty police officer's mere act of carrying a service weapon in accordance with police policy does not equate with "the use, attempted use, or threatened use of a dangerous weapon." This is true even if the officer is engaged in conduct that violates another's constitutional rights – for example, making an arrest at a protest that is subsequently found to violate the First Amendment, or impounding a car in violation of due process. To suggest otherwise would unjustifiably convert every violation of the first clause of §242 by a police officer into a violation of the second clause. Likewise, we caution that not every violation of constitutional rights by a police officer constitutes the willful deprivation of such rights in violation of §242.

reaching this conclusion, we align ourselves with the Fifth Circuit which held in *United States v. Williams,* 343 F.3d 423, 434 (5th Cir. 2003) that an offense based on the second clause of §242 is a crime of violence for purposes of §924(c)).

We turn next to Skinner's and Acosta's claims that their conspiracy convictions under §241 were not predicate crimes of violence that could support their corresponding §924(c) convictions. Under §241, "[i]f two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exerciser or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same" the conspirators shall be guilty of a crime and subject to criminal sanctions. 18 U.S.C. §241. Section 241, unlike the second clause of §242, does not explicitly mention the "use, attempted use or threatened use of physical force." However, under §924(c)(3)(B), a felony offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" also constitutes a crime of violence.

Section 241 proscribes conspiracies that seek to "injure, oppress, threaten, or intimidate any person" in connection with exercising or enjoying constitutional rights. Since applying physical force is perhaps the most obvious way to injure, threaten, or intimidate, a conspiracy to engage in such conduct is, by its nature, a conspiracy that involves a "substantial risk that physical force" will be used. *Cf. United States v. Doe*, 49 F.3d 859, 866 (2d Cir. 1995) ("Conspiracies that may properly be deemed crimes of violence include those whose objectives are violent crimes or those whose members intend to use violent methods to achieve the conspiracy's goals."); *Patino*, 962 F.2d at 267

("[W]hen a conspiracy exists to commit a crime of violence . . . the conspiracy itself poses a 'substantial risk' of violence, which qualifies it under Section 924(c)(1) and Section 924(c)(3)(B) as a crime of violence.").

A conspiracy conviction requires, among other things, proof of a specific intent to join the conspiracy with knowledge of its illegal purposes. *See, e.g., United States v. Glen*, 418 F.3d 181, 184 (2d Cir. 2005); *United States v. Diez*, 736 F.2d 840, 843 (2d Cir. 1984); *United States v. Cirillo*, 499 F.2d 872, 883 (2d Cir. 1974). The government proved that Acosta and Skinner knowingly joined the conspiracy charged under §241, and that they used armed force to steal drugs during raids and in connection with the intimidation of suspected drug dealers.[3]

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[3] We note that not all conduct by police officers acting in tandem that interferes with others exercising their constitutional rights constitutes a §241 violation. In the present case, however, the government established both the elements of a conspiracy and that the object and result of that conspiracy was to "injure, oppress, threaten, or intimidate" in connection with the exercise of constitutional rights.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of November, two thousand six.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. BARRINGTON D. PARKER,
Circuit Judge,

HON. LOUIS F. OBERDORFER,
District Judge.[4]

UNITED STATES OF AMERICA,

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[4] The Honorable Louis F. Oberdorfer, United States District Jude for the District of Columbia, sitting by designation.

Appellee,

v.

SUMMARY ORDER
Nos. 05-3346-cr(L)
05-3416-cr(CON)

SYLVESTRE ACOSTA, also known as SLY ACOSTA, and PAUL SKINNER,

Defendants-Appellants,

GERALD T. SKINNER,

Defendant.

For Appellee: WAN J. KIM, Assistant Attorney General (Jessica M. Dunsay Silver, Angela Miller, *on the brief*), Department of Justice, Washington, DC

For Defendant-Appellant Sylvestre Acosta: DAVID J. SEEGER (Leigh E. Anderson, *on the Brief*), Buffalo, NY.

For Defendant-Appellant Paul Skinner: PATRICK J. BROWN, LoTempio & Brown, P.C., Buffalo, NY.

Appeal from judgment of the United States District Court for Western District of New York (Richard J. Arcara, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the case be hereby AFFIRMED.

In a separate per curiam opinion filed today, we held that 18 U.S.C. §§241 and 242 are crimes of violence for purposes of 18 U.S.C. §924(c). *See United States v. Acosta*, Nos. 05-3346-cr (L), 05-3416-cr (CON), ---F.3d---, ____ WL ____ (2d Cir. ____, 2006) (per curiam). In this companion summary order, we address the other issues raised by Defendants-Appellants Sylvestre Acosta and Paul Skinner on appeal. We assume familiarity with the underlying facts, procedural history and issues on appeal.

I. Was there sufficient evidence to support the convictions?

We review a challenge to the sufficiency of the evidence supporting a criminal conviction *de novo*. *See United States v. Reyes*, 302 F.3d 48, 52-53 (2d Cir. 2002). We must affirm the conviction if the evidence, when viewed in the light most favorable to the government, would permit a rational jury to find the essential elements of the crime beyond a reasonable doubt. *See United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002). This requirement imposes a heavy burden on the defendant. *See United States v. Pipola*, 83 F.3d 556, 564 (2d Cir. 1996).

Both Skinner and Acosta claim that there was insufficient evidence to support their convictions for conspiracy to violate civil rights under color of law in violation of §241. We disagree. At trial the government proved the substantive charges against Skinner and Acosta of violating civil rights under color of law, and aiding and

abetting others in the commission of this crime in violation of §242 and 18 U.S.C. §2. The proof of these substantive charges constituted some of the proof of the §241 conspiracy charges. This proof included, *inter alia*, evidence that (1) Skinner falsified information for at least five search warrants and submitted false informant payment forms; (2) Skinner and Acosta participated in obtaining and executing at least three search warrants based on false information; and (3) Acosta received stolen money from these searches and stole property during two of these searches. The government also presented evidence of additional conduct by Skinner and Acosta in furtherance of the conspiracy that was not a part of the §242 offenses, including Skinner's and Acosta's participation in a warrantless raid of a hotel room and the execution of a search warrant on a home, during both of which money was stolen, and Acosta's stealing from a suspect during a traffic stop. Furthermore, the government presented evidence that Skinner, Acosta and their co-conspirators attempted to cover up the conspiracy, and agreed among themselves not to cooperate with the FBI. Viewing this evidence in a light most favorable to the government, a rational jury could have found beyond a reasonable doubt that Skinner and Acosta knew of the conspiracy to deprive persons of their civil rights, and knowingly and intentionally joined, and participated in, the conspiracy. *See United States v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004).

Skinner also claims that there was insufficient evidence to support his misdemeanor conviction under §242 and §2. This conviction was based on the discovery of a laptop computer in Skinner's home that had been taken during the search of a suspect's home. Skinner argues that there was no evidence that he acted willfully, because there was no proof that he removed the laptop from the suspect's home. We disagree. The government presented evidence

that (1) the laptop was found in Skinner's home, (2) officers were overheard arguing over who would get the laptop, (3) Skinner had purchased personal accessories for this laptop, (4) Skinner was the officer in charge of securing evidence during this raid, and (5) Skinner's superiors directly refuted his explanation that he had the laptop because he was analyzing it as part of an international drug investigation. A rational jury could have found beyond a reasonable doubt either that Skinner stole the laptop, or that he aided and abetted the theft of the laptop. *See United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990).

Finally, Skinner argues that there was insufficient evidence to support his felony conviction for using or carrying a firearm during the commission of a crime of violence in violation of §924(c), which was based on his underlying §241 conspiracy conviction. Skinner essentially argues that, even though he was a police officer participating in the execution of search warrants and raids, the government presented insufficient evidence that he carried a firearm during these activities. We disagree. The government presented evidence that it was standard police procedure was for all members of a search team to have their weapons drawn and to keep them drawn while entering a location in connection with drug activity. This fact alone was sufficient for a rational jury to conclude beyond a reasonable doubt that Skinner used or carried a firearm in furtherance of the conspiracy.

II. Did the indictment properly allege violations of §242?

Acosta argues for the first time on appeal that the indictment failed to state an actionable offense. Acosta specifically claims that a law enforcement officer's theft of

property from a victim does not constitute a violation of the Fourteenth Amendment, based on precedent from 42 U.S.C. §1983. An argument that an indictment fails to state an offense may be brought at any time while the case is pending, but when this argument is "urged for the first time on appeal, indictments . . . are construed more liberally . . . and every intendment is then indulged in support of the sufficiency." *United States v. Davila*, ---F.3d---, No. 05-2545-cr, 2006 WL 2501459, at *10 (2d Cir. Aug. 30, 2006) (internal quotation marks omitted); *see also* Fed. R. Crim, P. 12(b)(3)(B). We review this argument for plain error. *See United States v. Glick*, 142 F.3d 520, 523 (2d Cir. 1998).

There was no plain error here. In fact, Acosta's argument is contrary to the well-established law of our Circuit. In *United States v. McClean*, 528 F.2d 1250 (2d Cir. 1976), for example, we held that police officers acted under color of law when they stole and extorted proceeds of narcotics sales from targets of their investigations in violation of the Fourteenth Amendment, and thus in violation of §242. *Id.* at 1252, 1256; *see also United States v. Giordano*, 442 F.3d 30, 43 (2d Cir. 2006) (holding that "[t]he color of law element may be satisfied by the fact that an official gains access to the victim in the course of official duty") (citing *McClean*, 528 F.2d at 1255). Regardless, the indictment charged defendants with unlawfully depriving persons of *both* their Fourteenth and Fourth Amendment rights to be free from illegal searches and seizures. Acosta does not address the fact that the Fourth Amendment violations alone render the indictment valid.

III. Did the §924(c) charge and using a firearm during civil rights violations expose Acosta to double jeopardy?

For the first time on appeal Acosta argues that if the jury found he used a firearm in the course of the two substantive §242 counts, and these §242 counts contributed to the conspiracy conviction under §241, then these §242 counts could not also support his conviction for the §924(c) violation corresponding to the §241 conspiracy count. Otherwise, Acosta argues, this would constitute double jeopardy with respect to his two other §924(c) convictions, which correspond directly to the two substantive §242 counts. We disagree. The conspiracy conviction under §241 is a separate offense from the substantive §242 offenses, *see United States v. Campbell*, 300 F.3d 202, 216 (2d Cir. 2002), and as explained in Part I, *supra*, the conspiracy charge involved more and broader conduct than the substantive §242 offenses. *See United States v. Salameh*, 261 F.3d 271, 279 (2d Cir. 2001). Therefore, the §924(c) conviction related to the §241 conspiracy may have included different acts than the two §924(c) convictions related to the two specific §242 offenses.

Moreover, Acosta did not request a jury instruction limiting the jury's consideration of what conduct would support the §924(c) conviction related to the §241 conspiracy to conduct *other than* the conduct supporting the two §924(c) convictions related to the substantive §242 convictions. We have held that, even in light of *Stromberg v. California*, 283 U.S. 359 (1931), if an "impermissible basis of conviction arises from an insufficiency of evidence and a valid basis remains on an alternative theory, a defendant must request the trial judge not to submit the invalid basis to the jury or else the objection will be deemed waived." *United States v. Washington*, 861 F.2d 350, 352 (2d Cir. 1988); *see also Salameh*, 261 F.3d at 279 n.5. Acosta made no such objection before the trial court. Because the conspiracy involved broader conduct than the

substantive offense, and the jury could have reasonably convicted on this conduct, there was no error.

IV. Did the district court err in giving a *Pinkerton* jury charge?

Acosta argues that the district court's *Pinkerton* charge constructively amended the indictment by allowing the jury to find that Acosta could be held responsible for the substantive crimes committed by his co-conspirators if those crimes were reasonably foreseeable consequences of acts he committed in furtherance of the conspiracy. Acosta claims that unless the Government specified in the indictment that it intended to pursue a *Pinkerton* theory of liability, a constructive amendment of the indictment would result.

Aside from the fact that there was sufficient evidence to support a rational jury finding that Acosta himself engaged in the criminal violation of civil rights under §242, *see* Part I *supra*, there is no legal support for Acosta's proposition that the evidence presented and jury instructions modified the essential elements of the offense charged. *See United States v. Bryser*, 954 F.2d 79, 86 (2d Cir. 1992). Acosta's indictment specifically charged that "Acosta *and another*" committed the unlawful actions described in the substantive §242 counts, and also included a charge that he conspired to commit a violation of civil rights in violation of §241. Acosta was thus clearly charged with conspiring with others to violate civil constitutional rights and actually depriving certain victims of their constitutional rights. The *Pinkerton* charge did not subject Acosta to liability for any crime other than §242, it merely supplied another basis on which liability for this offense might be determined. Therefore, Acosta was "fully informed of the nature of the charges against him and was convicted of the crimes with

which he was charged." *United States v. Berger*, 224 F.3d 107, 117 (2d Cir. 2000).

V. Was jury instruction on "use" under 18 U.S.C. §242 plainly erroneous and prejudicial?

Acosta argues that the district court erred in instructing the jury on the definition of "use" in §242, because it was broader than the definition of "use" in §924(c), and thus claims that his two §242 convictions and his two corresponding §924(c) convictions must be reversed. Acosta did not object to the definition of "use," and therefore, we review the district court's jury instruction on this issue for plain error. *See United States v. Carr*, 424 F.3d 213, 219 (2d Cir. 2005).

Acosta cites no authority for the proposition that the term "use" of a weapon under §242 was intended to have the same meaning as "use" of a weapon under §924(c). Regardless, many portions of the district court's description of term "use" in the portion of the charge on §242 and the description of "use" in the portion of the charge on §924(c) were similar. Thus, viewing the charge as a whole, the "use" instruction was not plainly erroneous. *See United States v. Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989).

VI. Did the defendants receive a fair trial?

Skinner argues that his Sixth Amendment right to a fair trial was denied because of the district court's management of the trial and rulings on objections. Acosta additionally argues that the district court committed reversible error in its preliminary charge to the jury because it did not instruct the jury that it must find Acosta and Skinner not guilty if the prosecution failed to establish the elements of the crimes charged beyond a reasonable doubt.

These arguments are wholly without merit. Skinner does not explain how any of the district court's rulings were in error. To the contrary, the district court simply ran a trial in which Skinner and Acosta won some objections and lot others, and our review of the record yields no evidence whatsoever that the trial judge was biased. Moreover, the five times that the district court instructed the jury that it must find Acosta and Skinner not guilty if the government fails to meet its burden of proof in its final jury charge more than made up for any omission of this instruction in the preliminary jury charge.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the companion per curiam opinion filed today, the judgments of conviction are affirmed.

FOR THE COURT:

Thomas W. Asreen, Acting Clerk

By: Richard Alcantara, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

DECISION AND ORDER

03-CR-11A

PAUL D. SKINNER and
SYLVESTRE ACOSTA,

Defendants.

INTRODUCTION

On October 30, 2003, a federal grand jury returned a 14-count Second Superseding Indictment against Paul D. Skinner, Sylvestre Acosta and Gerald T. Skinner, all of whom were, at all relevant times, employed as narcotics detectives by the City of Buffalo Police Department, charging them with conspiracy to deprive and depriving others of their constitutional rights, while acting under color of law, in violation of 18 U.S.C. §§241, 242 and 2; and with using or carrying firearms during and in relation to these offenses, in violation of 18 U.S.C. §§924(c) and 2. A jury trial involving defendants Paul D. Skinner and Acosta commenced on November 29, 2004, and concluded with a verdict rendered on December 17, 2004.[5] The jury found Acosta guilty of three counts of depriving constitutional rights (Counts 1, 2 and 3), in violation of §§242 and 2[6]; one

[5] Gerald Skinner, the third individual charged, pleaded guilty to one count of conspiracy to deprive others of their constitutional rights, in violation of §241, and was sentenced by this Court to a term of imprisonment of 30 months.

[6] The jury found that two of the three §242 counts (Counts 2 and 3) involved the use of a dangerous weapon, thereby making them felonies.

count of conspiracy to deprive constitutional rights (Count 5), in violation of §241; and three counts of using or carrying a firearm during and in relation to these offenses (Counts 6, 7 and 9), in violation of §§924(c) and 2. The jury found Skinner guilty of one count of depriving constitutional rights (Count 4), in violation of §§242 and 2[7]; one count of conspiracy to deprive constitutional rights (Count 5), in violation of §241; and one count of using or carrying a firearm during and in relation to the conspiracy offense (Count 9), in violation of §§924(c) and 2.

Currently before the Court are the motions of defendants Paul Skinner and Acosta for judgments of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The government opposes the motions. Oral argument on the motions was held on March 15, 2005.

After reviewing the submissions of the parties and hearing argument from counsel, the Court denies defendants' motions for judgments of acquittal.[8]

DISCUSSION

1. ***Rule 29 Standard***

The Court can enter a judgment of acquittal under Rule 29 on the grounds of insufficient evidence only if, after viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences in the government's favor, it concludes no rational trier of fact

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The remaining count (Count 1) did not involve a dangerous weapon and therefore is only a misdemeanor.

[7] The jury found that a dangerous weapon was not involved in this §242 offense (Count 4), thus making it only a misdemeanor.

[8] The Court notes that in deciding defendants' motions, it does not have available to it the trial transcripts.

could have found the defendant guilty beyond a reasonable doubt. United States v. Reyes, 302 F.3d 48, 52 (2d Cir. 2002) (citing Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)). A defendant who challenges the sufficiency of the evidence "bears a heavy burden." United States v. Finley, 245 F.3d 199, 202 (2d Cir. 2001), cert. denied, 534 U.S. 1144 (2002). As the Second Circuit has observed:

> We have emphasized that courts must be careful to avoid usurping the role of the jury when confronted with a motion for acquittal. Indeed, it is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence. The traditional deference accorded to a jury's verdict is especially important when reviewing a conviction for conspiracy . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel. Finally, we bear in mind that the jury's verdict may rest entirely on circumstantial evidence.

United States v. Jackson, 335 F.3d 170, 180 (2d Cir. 2003) (internal quotations and citations omitted).

Applying this standard to the instant case, the Court finds that there is sufficient evidence to sustain the jury's verdicts as to both defendants.

2. ***Section 924(c) Convictions***

The defendants challenge their convictions under 18

U.S.C. §924(c), claiming that the proof at trial was insufficient to sustain the charges. Specifically, Acosta claims that the proof regarding Counts 6, 7 and 9 was insufficient, while Skinner claims that the proof regarding Count 9 was insufficient.

Counts 6, 7 and 9 allege that the defendants either acted as principals in the charged violations of §924(c) or aided and abetted or willfully caused others to violate §924(c), in violation of 18 U.S.C. §2. The Court instructed the jury on these two alternative theories of liability. Thus, in determining defendants' Rule 29 motions, the Court need only consider whether the government's evidence was sufficient to support the jury's verdict on either of these theories. See United States v. Masott, 73 F.3d 1233, 1241 (2d Cir.) ("When the jury is properly instructed on two alternative theories of liability, as here, we must affirm when the evidence is sufficient under either of the theories.") (citations omitted), cert. denied, 519 U.S. 810 (1996).

The Court finds that there was sufficient evidence to find defendants guilty of the §924(c) charges as either principals or under the alternative theory of aiding and abetting or willfully causing others to violate the statute, in violation of 18 U.S.C. §2.

A. *Defendant Acosta Guilty as Principal on Counts 6 and 7*

18 U.S.C. §924(c) provides, in pertinent part:

> Any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking

> crime – be sentenced to a[n additional] term of imprisonment . . .

In order to prove a defendant guilty of a §924(c) violation, the government must establish three elements beyond a reasonable doubt.

> First, the defendant must have used or carried a firearm. The terms "use" and "carry" are not synonymous. A defendant "uses" a firearm by actively employing it. "Active employment" can mean, among other things, "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." By contrast, a defendant "carries" a firearm by either bearing it on his person or "knowingly possess[ing] and convey[ing it] in a vehicle, including in the locked glove compartment or truck of a car, which the person accompanies." A defendant may therefore be found guilty of carrying a firearm, even though not found to have actively employed it.
>
> Second, the government must prove the defendant used or carried the firearm "knowingly." Third and finally, there must be an underlying "crime of violence," defined by the statute as "an offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that

> physical force against the person or property of another may be used in the course of committing the offense." Further, the firearm must have been used or carried "during and *in relation to*" the underlying offense.

United States v. Desena, 287 F.3d 170, 180 (2d Cir. 2002) (citations omitted) (emphasis in original).

With regard to Counts 6 and 7, the Court finds that, viewing all the evidence in the light most favorable to the government and drawing all reasonable inferences from that evidence in the government's favor, the jury could have concluded beyond a reasonable doubt that Acosta used or carried a firearm during and in relation to the crimes charged in Counts 2 and 3, which are the predicate offenses for Counts 6 and 7 respectively. Counts 2 and 3 charge Acosta with depriving others of their constitutional rights in violation of §242, by executing search warrants upon the victims' residences, knowing that such warrants were obtained on false information, for the purpose of taking the victims' property without due process of law.

Acosta argues that Counts 6 and 7 must be dismissed because there was no eyewitness testimony or any other evidence that he was actually using or carrying a firearm when the search warrants at issue in Counts 2 and 3 were executed. The Court finds this argument without merit. Lieutenant Thomas Lyons testified that pursuant to Buffalo Police Department standard procedure, all members of a search warrant team are armed and have their firearms drawn when entry is made into a premises. In addition, each search warrant team has a shotgun officer and shotgun assist officer assigned, who are responsible for operating the shotguns that are used during the execution of the search warrant. Lyons indicated that the only members of the team who do not have

their firearms drawn at the time of entry are the ram and pick persons, who leave their firearms holstered until entry is made. Further, the evidence shows that Acosta was a member of the search warrant teams that executed the search warrants at issue in Counts 2 and 3. Accordingly, the Court finds that there is sufficient evidence from which the jury could have found beyond a reasonable doubt that Acosta was using or carrying a firearm during and in relation to the offenses charged in Counts 2 and 3.[9]

Acosta further argues that even if he was using or carrying a firearm when the search warrants at issue were executed, he was doing so pursuant to his duties as a police officer, and therefore cannot be found guilty of violating §924(c). Again, the Court finds this argument unavailing.

In Smith v. United States, 508 U.S. 223 (1993), the Supreme Court held that the phrase "in relation to":

> Is expansive . . . [A]t a minimum, [it] clarifies that the firearm must have some purpose or effect with respect to the [predicate offense]; its presence of involvement cannot be the result of accident or coincidence. As one court has observed, the "in relation to" language "allay[s] explicitly the concern that a person could be" punished under §924(c)(1) for committing a [predicate offense] "while in possession of a firearm" even though the firearm's presence is coincidental or entirely "unrelated" to the crime. Instead, the gun

[9] Even absent the evidence cited here to support a finding that Acosta was in fact armed when he executed the search warrants in question, the jury certainly could have reasonably inferred that a police officer executing a search warrant would be armed.

at least must "*facilitate, or have the potential of facilitating*," the [predicate offense].

Id. at 237-38 (emphasis added) (citations omitted).

Thus, the "during and in relation to" requirement of §924(c) necessitates some nexus between the firearm and the predicate offense. United States v. Munoz, 143 F.3d 632, 637 n.5 (2d Cir. 1998). The firearm must have some purpose or effect with respect to the predicate offense. Id. (citation omitted). Additionally, the proof must show that the firearm was an integral part of the predicate offense and in some manner facilitated that offense. Id. (citation omitted). There is no requirement, however, that the predicate offense be the sole reason for the possession of the firearm. United States v. Radcliff, 331 F.3d 1153, 1158-59 (10th Cir.) (citations omitted), cert. denied, 540 U.S. 973 (2003).

Here, the jury could have found beyond a reasonable doubt that Acosta used or carried a firearm to facilitate or potentially facilitate the crimes charged in Counts 2 and 3. The presence of the firearm deterred resistance from the victim residents when the search warrants were executed. See Radcliff, 331 F.3d at 1159 (citation omitted). The firearm was also available to protect Acosta in the event that victim residents attempted to resist or harm him.

This does not mean that any time a police officer commits a theft while carrying his firearm, he has automatically violated §924(c). Rather, this case is more limited. Based on the evidence adduced at trial, the jury could reasonably conclude, and obviously did conclude, that Acosta used his status as a police officer, with all the trappings, including the use or carrying of a firearm, to commit the crimes charged in Counts 2 and 3. See United States v.Moore, 363 F.3d 631, 640-41 (7th Cir. 2004) (fact

that defendant police officers were hired to use their status as police officers, with all the trappings, to protect drug couriers was sufficient to support their §924(c) convictions), vacated on other grounds, sub nom. Young v. United States, 125 S. Ct. 1019 (2005); Radcliff, 331 F.3d at 1159 (fact that defendant law enforcement officer used or carried his weapon to deter interference with his wife's transport of methamphetamine was sufficient to support §924(c) conviction); United States v. Novaton, 271 F.3d 968, 1013 (11th Cir. 2001) (rejecting defendant's argument attacking the sufficiency of the evidence supporting his 924(c) conviction noting that "[i]n light of that evidence, it was certainly reasonable for the jury to conclude that [defendant] used his weapon, albeit a police-issued service firearm, 'in relation to' the [underlying predicate crime] and that his carrying the weapon facilitated, or had the potential for facilitating, the co-conspirators' [commission of the underlying predicate crime]."), cert. denied, 535 U.S. 1120 (2002). The instant case it not a case where the presence of the firearm was an accident or coincidence.

The legislative history of the 1984 amendments to §924(c) makes clear Congress' intent that the statute applies to an armed police officer using or carrying his weapon during and in relation to the commission of a crime of violence:

> The requirement . . . that the gun be carried unlawfully, a fact usually proven by showing that the defendant was in violation of State or local law, has been eliminated as unnecessary. The "unlawfully" provision was added originally to section 924(c) because of Congressional concern that without it policemen and persons licensed to carry firearms who committed federal felonies

> would be subjected to additional penalties, even where the weapon played no part in the crime, whereas the section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act. See United States v. Howard, 504 F.2d 1281, 1285-1286 (8th Cir. 1974). The Committee has concluded that *persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as a person whose possession of the gun violates a State or local ordinance.*

S. Rep. No. 98-225, reprinted in 1984 U.S.C.C.A.N. 3182, 3492 n. 10 (emphasis added).

B. ***Defendant Acosta Guilty on Counts 6 and 7 under 18 U.S.C. §2***

Counts 6 and 7 also charge Acosta with aiding and abetting or willfully causing others to violate 924(c), in violation of 18 U.S.C. §2, which provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The jury was charged on both §2(a) and §2(b).

Section 2(a) requires a showing that the aider and abettor shared the primary actor's criminal intent. United States v. Concepcion, 983 F.2d 369, 383 (2d Cir. 1992) (citations omitted), cert. denied, 510 U.S. 856 (1993). To find a defendant guilty of aiding and abetting a §924(c) charge under §2(a), it must be shown that the defendant knew of the underlying crime, had an interest in furthering it, and consciously assisted others in the use or carrying of weapons in the underlying crime. United States v. Persico, 164 F.3d 796, 802 (2d Cir.), cert. denied, 528 U.S. 870 (1999).

Section 2(b), on the other hand, provides that "an individual is criminally culpable when an intermediary is used to commit a criminal act, even though that intermediary has no criminal intent and is innocent of the substantive crime." See United States v. Walser, 3 F.3d 380, 388 (11th Cir. 1993) (citations omitted); see also United States v. Gabriel, 125 F.3d 89, 99 (2d Cir. 1997) (noting that §2(b) punishes "a person who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States. It [establishes that one who] . . . causes the commission of an indispensable element of the offense by an innocent agent . . . is guilty as a principal.'") (internal quotations and citations omitted).

Here, there was sufficient evidence from which the jury could find beyond a reasonable doubt that Acosta aided and abetted or willfully caused others to violate 924(c), as charged in Counts 6 and 7.

With respect to Count 6, the evidence showed that when Acosta and others executed the search warrant at 120 Potomac (Count 2), Gerald Skinner, a coconspirator, actually

discharged his shotgun after the officers made entry into the residence. Moreover, the evidence showed that another coconspirator, Rene Gil, put a gun to victim's head as he was stealing his money – money which was later shared with Acosta.

With respect to Count 7, the evidence also supports the conclusion that Acosta aided and abetted or willfully caused another's use of a firearm in violation of §924(c). The evidence showed that coconspirator Gerald Skinner wielded a shotgun upon entry into 395 West Delevan (Count 3). In addition, the evidence showed that another detective, Lawrence Sadlocha, actually discharged his firearm when the victim attempted to escape.

With regard to both of these Counts, there was sufficient evidence from which the jury could find that Acosta knew of the underlying crime, had an interest in furthering it, and consciously assisted others in the use or carrying of weapons in the underlying crime. He assisted the others by carrying his own weapon, providing a show of force and being available to protect or assist the others if necessary while they were committing the §924(c) offense.

C. *Both Defendants Guilty on Count 9 as either Principals* or Aiders and Abettors

Count 9 charges both Skinner and Acosta with violating §924(c) as it relates to the underlying conspiracy count contained in Count 5. Both defendants argue that there is insufficient evidence to support their convictions on Count 9. The Court finds their arguments without merit.

Preliminarily, the Court notes that "[a]lthough only one §924(c) violation can be appended to any single crime of violence, a substantive offense and the conspiracy to commit

that offense are separate crimes[.]" United States v. Campbell, 300 F.3d 202, 216(2d Cir. 2002) (citations omitted), cert. denied, 538 U.S. 1049 (2003). Thus, Count 9 alleges a crime separate and apart from the other §924(c) charges.

There was sufficient evidence adduced at trial from which the jury could conclude beyond a reasonable doubt that defendants Paul Skinner and Acosta conspired together and with others, including Buffalo Police Detectives Rene Gil, Gerald Skinner, Bobby Hill, and Andy Ortiz, to deprive inhabitants of the State of New York of their constitutional rights, as charged in Count 5. The jury could also conclude beyond a reasonable doubt that this conspiracy included the substantive crimes charges in Counts 2, 3 and 4.

Skinner argues that the evidence was insufficient to establish his membership in the charged conspiracy. However, the government presented evidence showing that he personally committed various acts in furtherance of the conspiracy, including falsifying evidence to obtain search warrants, stealing the property of others when executing the search warrants, sharing or seeking to share in the proceeds of thefts committed during the execution of the search warrants, and falsifying other paperwork in an attempt to conceal the crimes that he and his coconspirators were committing. In addition, the evidence demonstrated that Skinner was present for and participated in conversations and discussions with other members of the conspiracy regarding how they would go about violating the constitutional rights of persons they encountered during the course of their duties as police officers, and how the proceeds of their unlawful activities would be distributed. Based on this evidence, the jury could conclude beyond a reasonable doubt that Skinner was a member of the conspiracy charged in Count 5. See United States v.

Samaria, 239 F.3d 228, 235 (2d Cir. 2001) (citations omitted).

As discussed above with regard to Acosta, the jury could also find beyond a reasonable doubt that Skinner was present and participated in the execution of the search warrants at 120 Potomac (Count 2) and 395 West Delevan (Count 3), that he was armed on those occasions, and that he used or carried his firearm during and in relation to those crimes. Moreover, again as discussed above with regard to Acosta, the jury could conclude that Skinner aided and abetted or willfully caused others to violate §924(c) as it relates to Counts 2 and 3, which are both crimes committed as part of the conspiracy charged in Count 5.

In sum, the evidence adduced at trial supports the jury's conclusion that a conspiracy to deprive others of their constitutional rights as charged in Count 5 existed, that both Skinner and Acosta were members of that conspiracy, and that they both either personally used or carried firearms, or aided and abetted or willfully caused others to use or carry firearms, during and in relation to that conspiracy.[10]

Finally, defendants assert that the §241 conspiracy charged in Count 5 is not a crime of violence, and therefore cannot serve as a predicate offense with regard to the §924(c) charge in Count 9. The Court finds this argument without merit. See United States v. Greer, 939 F.2d 1076, 1098-1099 (5th Cir. 1991) (holding that a §241 conspiracy is a crime of violence for purposes of §924(c)), aff'd en banc, 968 F.2d 433 (5th Cir. 1992), cert. denied, 507 U.S. 962 (1993).

---

[10] The government also asserts that the defendants may be found guilty on Counts 6, 7 and 9 based on the Pinkerton theory. In light of the Court's holding, it need not address that issue.

CONCLUSION

For the reasons stated, defendants' motions for judgment of acquittal are hereby denied. Sentencing for Acosta shall be held on May 11, 2005 at 12:30 p.m. Sentencing for Skinner shall be held on May 27, 2005 at 12:30 p.m.

IT IS SO ORDERED.

/s/Richard J. Arcara
HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

Dated: April 6, 2005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK
Date:
Docket Number: 05-3346-cr
Short Title: USA v. Skinner (Acosta)
DC Docket Number: 03-cr-11
DC: WDNY (BUFFALO)
DC Judge: Honorable Richard Arcara

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of February, two thousand seven.

Present:
Hon. Dennis Jacobs,
Chief Judge,
UNITED STATES COURT
OF APPEALS
FEB. 13 2007
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

Appellee,

Hon. Barrington D. Parker, Jr.,
Circuit Judge,
Hon. Louis F. Oberdorfer,
District Judge.

United States of America,
Appellee,
v. 05-3346-cr(L), 05-3416 (CON)
Gerald T. Skinner,
Defendant.

Sylvestre Acosta, also known as Sly Acosta, Paul Skinner,
Defendant-Appellants.

A petition for panel rehearing having been filed herein by Paul Skinner.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the Court,

Thomas Asreen, Acting Clerk
s/Arthur Heller
By: Arthur Heller
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:	
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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of February, two thousand seven.

United States of America,

Appellee,

-v-

Gerald T. Skinner,

Defendant.

UNITED STATES
COURT OF APPEALS
FILED FEB 13 2007

Thomas Asreen, Acting
Clerk

SECOND CIRCUIT

05-3346-cr (L), 05-3416 CON)

Sylvestre Acosta, also known as Sly Acosta, Paul Skinner,

Defendant-Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Sylvestre Acosta. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk
s/Arthur Heller

By: Arthur Heller
Motion Staff Attorney

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. §16 defines a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §241 states in relevant part:

> If two or more persons conspire to injure, oppress, threaten, or intimiate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured –
>
> They shall be fined under this title or imprisoned not more than ten years, or

> both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. §242 states in relevant part:

> [1] Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both; and
>
> [2] if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and [3] if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this

title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. §924(c) states in relevant part:

> (1)(A) [A]ny person who, during and in relation to any crime of violence . . . (including a crime of violence . . . that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . . [be subject to certain minimum terms of imprisonment] . . . .
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –
>
> > (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Redacted Second Superseding Indictment, Dated October 30, 2003.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of New York

NOVEMBER 2001 GRAND JURY
(Empaneled 11/02/01)

THE UNITED STATES OF AMERICA

-vs-

PAUL D. SKINNER, and
SYLVESTRE ACOSTA
a/k/a SLY ACOSTA

03-CR-011-A
SECOND
SUPERSEDING
INDICTMENT

Violations:

Title 18, United States Code, Sections 2, 241, 242, and 924(c)

COUNT 1

The Grand Jury Charges:

On or about January 12, 1998, in the Western District of New York, the defendant, SYLVESTRE ACOSTA a/k/a SLY ACOSTA and another, then officers with the City of Buffalo Police Department, while acting under color the laws of the State of New York, did willfully steal, purloin, acquire, and appropriate for their own use, property

belonging to Alberto Addarich, a resident of the State of New York, that is, approximately three thousand, six hundred dollars ($3600) in United States currency, and by participating in the execution of a search warrant knowing that such warrant had been obtained through the presentation of false information to a judicial officer, did thereby willfully deprive Alberto Addarich of rights preserved and protected by the Constitution and the laws of the United States, that is, the right to be free from unreasonable searches and seizures by one acting under color of law, and the right not to be deprived of property without due process of law by one acting under color of law; all in violation of Title 18, United States Code, Sections 242 and 2.

Count 2

The Grand Jury Further Charges:

On or about February 2, 1998, in the Western District of New York, the defendant, SYLVESTRE ACOSTA a/k/a SLY ACOSTA and another, then officers with the City of Buffalo Police Department, while acting under color of the laws of the State of New York, did, through the use, attempted use,and threatened use of a dangerous weapon, willfully steal, purloin, acquire, and appropriate for their own use, property belonging to Edgardo Berrios, a resident of the State of New York, that is, a quantity of United States currency, and other items of personal property, including electronic equipment, and did, by participating in the execution of a search warrant knowing that such warrant had been obtained through the presentation of false information to a judicial officer, willfully deprive Edgardo Berrios, a resident of the State of New York, of rights preserved and protected by the Constitution and the laws of the United States, that is, the right to be free from unreasonable searches and seizures by one acting under color of law, and the right

not to be deprived of property without due process of law by one acting under color of law; all in violation of Title 18, United States Code, Sections 242 and 2.

Count 3

The Grand Jury Further Charges:

On or about February 3, 1998, in the Western District of New York, the defendant, Sylvestre Acosta A/K/A sly Acosta AND ANOTHER THEN OFFICERS WITH THE City of Buffalo Police Department, while acting under color of the laws of the State of New York, did through the use, attempted use, and threatened use of a dangerous weapon, willfully steal, purloin, acquire, and appropriate for their own use, property belonging to Victor Miller, a resident of the State of New York, that is, a quantity of United States currency, and other items of personal property, including jewelry, and did, by participating in the execution of a search warrant knowing that such warrant had been obtained through the presentation of false information to a judicial officer, willfully deprive Victor Miller, a resident of the State of New York, of rights preserved and protected by the Constitution and the laws of the United States, that is, the right to be free from unreasonable searches and seizures by one acting under color of law, and the right not to be deprived of property without due process of law by one acting under color of law; all in violation of Title 18, United States Code, Sections 242 and 2.

Count 4

The Grand Jury Further Charges:

On or about August 14, 2001, in the Western District of New York, the defendant, PAUL D. SKINNER, then an

officer with the City of Buffalo Police Department, while acting under color of the laws of the State of New York, did, through the use, attempted use, and threatened use of a dangerous weapon, willfully steal, purloin, acquire, and appropriate for his own use, property belonging to John Toledo, a resident of the State of New York, that is, SONY laptop computer, and other items of personal property, including a black handled switch-blade knife, and did thereby willfully deprive John Toledo of rights preserved and protected by the Constitution and the laws of the United States, that is, the right to be free from unreasonable searches and seizures by one acting under color of law, and the right not to be deprived of property without due process of law by one acting under color of law; all in violation of Title 18, United States Code, Sections 242 and 2.

Count 5

The Grand Jury Further Charges:

Between in or about January of 1993, the exact date being unknown, and on or about August 28, 2001, in the Western District of New York, the defendant PAUL D. SKINNER, SYLVESTRE ACOSTA a/k/a SLY ACOSTA, and others, then officers with the City of Buffalo Police Department, while acting under color of the laws of the State of New York, did knowingly, willfully, and unlawfully combine, conspire, and agree together, and with others, known and unknown, to injure, oppress, threaten and intimidate inhabitants of the State of New York in the free exercise and enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, that is, the right to be free from the deprivation of property without due process of law by one acting under color of law, and the right to be free from unreasonable searches and

seizures by one acting under color of law; all in violation of Title 18, United States Code, Section 241.

Counts 6 through 9

The Grand Jury Further Charges:

On or about the dates set forth below, in the Western District of New York, the defendants set forth below, did knowingly, willfully, and unlawfully use and carry firearms, during and in relation to the crimes of violence committed in the manner alleged in the Counts of this Superseding Indictment set forth below, the allegations of which are incorporated therein by reference:

COUNT	DATE	DEFENDANT(S)	CRIME OF VIO.
6	2/2/98	SYLVESTRE ACOSTA a/k/a SLY ACOSTA	Count 2 (18 USC §2 & 242)
7	2/3/98	SYLVESTRE ACOSTA a/k/a SLY ACOSTA	Count 3 (18 USC §2 & 242)
8	8/14/01	PAUL D. SKINNER	Count 4 (18 USC §2 & 242)
9	Between 2/2/98 and 8/28/01	SYLVESTRE ACOSTA a/k/a SLY ACOSTA PAUL SKINNER	Count 5 (18 USC §241)

All in violation of Title 18, United States Code, Sections 924(c) and 2.

DATED: Buffalo, New York, October 30, 2003.

s/Michael A. Battle
MICHAEL A. BATTLE
United States Attorney

A TRUE BILL:

s/_____
Deputy Foreperson

No. 07-60

In the Supreme Court of the United States

SYLVESTRE ACOSTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
RENA J. COMISAC
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a police officer who falsified search warrants, participated in illegal searches, and stole personal property during the execution of the searches was properly convicted of depriving persons of their constitutional rights, in violation of 18 U.S.C. 242.

2. Whether the district court constructively amended the indictment when it instructed the jury that petitioner could be held liable on the charges against him based on the foreseeable actions of his co-conspirators taken in furtherance of the conspiracy.

3. Whether petitioner's convictions for using or carrying a firearm during and in relation to an eight-year conspiracy to violate civil rights, and using or carrying a firearm during and in relation to two distinct substantive civil rights violations during the time span of the conspiracy, violated his double jeopardy rights.

4. Whether the district court committed reversible plain error when it instructed the jury that, for purposes of 18 U.S.C. 242, the "use, attempted use, or threatened use of a dangerous weapon" means "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right," and "brandish[ing], display[ing], or referr[ing] to" the weapon.

5. Whether deprivation of rights involving the use, attempted use, or threatened use of a dangerous weapon in violation of 18 U.S.C. 242 is a crime of violence under 18 U.S.C. 924(c).

6. Whether conspiring to injure, oppress, threaten, or intimidate persons in the exercise or enjoyment of their constitutional rights in violation of 18 U.S.C. 241 constitutes a crime of violence under 18 U.S.C. 924(c).

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In the Supreme Court of the United States

No. 07-60

SYLVESTRE ACOSTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 470 F.3d 132. The companion summary order of the court of appeals (Pet. App. 10-19) is not published in the *Federal Reporter* but is reprinted in 207 Fed. Appx. 39.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2006. A petition for rehearing was denied on February 13, 2007 (Pet. App. 37-38). The petition for a writ of certiorari was filed on May 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of conspiracy to injure, threaten, or intimidate persons in their exercise of federally protected rights, in violation of 18 U.S.C. 241; deprivation of civil rights under color of law, in violation of 18 U.S.C. 242; and use of a firearm during and in relation to the commission of a crime of violence, in violation of 18 U.S.C. 924(c).[1] He was sentenced to imprisonment for 45 years and one day, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-19.

1. Between 1989 and 2001, petitioner was a police officer assigned to various units combating drug traffic in the lower west side of Buffalo, New York. During that time, petitioner and other Buffalo narcotics officers entered into a scheme to steal money and property from suspects. They accomplished their objective by obtaining search warrants on the basis of false information, which they incorrectly attributed to reliable informants, and covering up the practice by falsifying fund disbursement forms to suggest that the informants had been paid for providing information when they had not actually done so. After executing the warrants, they stole money and property from the suspects and divided the stolen goods amongst themselves. Pet. App. 13; Gov't C.A. Br. 6-12.

During the execution of any search warrant, it was standard police procedure for the officers to have their weapons drawn and ready to fire. Pet. App. 14; Gov't C.A. Br. 11. On at least two occasions, members of the

---

[1] All references to 18 U.S.C. 924(c) are to 18 U.S.C. 924(c) (2000 & Supp. IV 2004).

search t[illegible] fired their weapons during the execution of the searc[illegible] *Id.* at 15, 17, 38.

Petitioner's participation in the scheme was not limited to taking property after executing falsified search warrants. Petitioner and his co-conspirators threatened an informant by sticking a gun in his mouth and forcing him to provide additional leads for future drug raids during which they could steal additional money and property, and petitioner once stole money from a suspect during a traffic stop. Gov't C.A. Br. 12-13, 29.

2. Petitioner was indicted on one count of conspiracy to deprive individuals of their Fourth and Fourteenth Amendment rights, one misdemeanor and two felony counts of deprivation of civil rights under color of law, and three counts of using a firearm during and in relation to the commission of a crime of violence. The three firearm counts corresponded to the conspiracy count and the two felony counts of violation of 18 U.S.C. 242. Pet. App. 43-48. Petitioner was convicted on all counts. *Id.* 20-21.

3. On appeal, petitioner raised, among other challenges, several objections to his conviction for violation of 18 U.S.C. 242. First, petitioner contended (Pet. C.A. Br. 22-30) that the indictment was invalid because a police officer's unauthorized theft of private property does not, as the indictment charged, constitute a deprivation of due process of law. Second, petitioner claimed (*id.* at 30-39) that the district court had constructively amended the indictment by instructing the jury that petitioner could be found guilty of the charged substantive civil rights violations if the jury determined that any of his co-conspirators had engaged in those acts in furtherance of the conspiracy. See *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Finally, petitioner argued

(Pet. C.A. Br. 43-47) that the district court erred when it instructed the jury that, for purposes of petitioner's 18 U.S.C. 242 charges, using, attempting to use, or threatening the use of a dangerous weapon means "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right." 12/10/04 Trial Tr. 1625. Petitioner claimed that the instruction was inconsistent with this Court's interpretation of the term "use" as it is employed in 18 U.S.C. 924(c). See *Bailey* v. *United States*, 516 U.S. 137 (1995).

Petitioner also raised a number of objections to his firearm convictions under 18 U.S.C. 924(c), asserting that (1) his Section 924(c) conviction relating to the conspiracy charge was invalid on double jeopardy grounds, and (2) 18 U.S.C. 241 and are not crimes of violence that can support Section 924(c) charges. Pet. C.A. Br. 39-41, 47-61.

4. The court of appeals affirmed. Pet. App. 1-9, 10-19. In a published per curiam opinion (*id.* at 1-9), the court of appeals rejected petitioner's claims that 18 U.S.C. 241 and 242 are not crimes of violence within the meaning of 18 U.S.C. 924(c). Applying a categorical approach, see *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), the court concluded that petitioner's violation of 18 U.S.C. 242 qualifies as a crime of violence because he had been charged with, and the jury had found him guilty of, the felony version of that offense requiring "the use, attempted use, or threatened use of a dangerous weapon" in connection with the offense. Pet. App. 7. The court also concluded that 18 U.S.C. 241, which proscribes conspiracies that seek to "injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment" of a constitutional right, is an offense that, by its nature, "involves a substantial risk

that physical force will be used." Pet. App. 8 (internal quotation marks and citation omitted).

The court disposed of petitioner's remaining arguments in an unpublished order. Pet. App. 10-19. The court rejected petitioner's argument that the indictment did not properly allege violations of Section 242 based on a violation of the Fourteenth Amendment. *Id.* at 14-15. Applying plain-error review and relying on circuit precedent, the court held that officers violate the Fourteenth Amendment when they use their official positions to steal property from targets of their investigations. *Id.* at 15. The court further held that the indictment stated a violation of 18 U.S.C. 242 because it also alleged that petitioner deprived persons of their Fourth Amendment right to be free from illegal searches and seizures. Pet. App. 15.

The court also rejected petitioner's claim that the district court's *Pinkerton* charge constructively amended the indictment by allowing the jury to convict petitioner for the substantive crimes committed by his co-conspirators. The court reasoned that petitioner was charged with conspiring with others to violate persons' constitutional rights and actually depriving persons of their constitutional rights, and that the *Pinkerton* charge "did not subject [petitioner] to liability for any crime other than §242, it merely supplied another basis on which liability for this offense might be determined." Pet. App. 17. The court also noted that there was, in any event, sufficient evidence for the jury to convict the petitioner as a principal or aider and abettor. *Ibid.*

The court also rejected petitioner's claim, raised for the first time on appeal, that the district court's instructions concerning the meaning of the word "use" under 18 U.S.C. 242 were inconsistent with this Court's interpre-

tation of 18 U.S.C. 924(c) in *Bailey*, 516 U.S. 137. In finding the absence of plain error, the court explained that no authority exists for the proposition that the terms "use" under Sections 242 and 924(c) have the same meaning, and that, in any event, the district court's "use" instructions in the portion of the charge concerning Section 242 were consistent with its instructions concerning Section 924(c). Pet. App. 18.

The court rejected petitioner's argument, also raised for the first time on appeal, that he was subject to double jeopardy because he was convicted of violating 18 U.S.C. 924(c) for having used or carried a firearm during and in relation to his 18 U.S.C. 241 conspiracy conviction, as well as being convicted of separate Section 924(c) violations based on the 18 U.S.C. 242 substantive civil rights violations that occurred during the conspiracy. The court explained that the conspiracy charge encompassed broader conduct than just the two substantive civil rights offenses, and the jury could reasonably have found petitioner guilty for using a firearm during that broader conduct. Pet. App. 16-17.

ARGUMENT

1. Petitioner argues (Pet. 10-15) that the district court committed reversible error by instructing the jury that a police officer who steals private property under color of law has deprived his victim of property without due process of law in violation of the Fourteenth Amendment, and therefore may be found guilty of violating 18 U.S.C. 242. Petitioner contends that, under this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), the officer does not violate the Fourteenth Amendment unless and until the State provides or refuses to provide a remedy for

the victim's loss. Petitioner's argument does not warrant this Court's review.

a. As a threshold matter, review should be denied because petitioner's challenge to the jury instructions was neither pressed nor passed on below. In the court of appeals, petitioner invoked *Parratt* and *Hudson* only to argue that the indictment failed to state an actionable offense. Pet. C.A. Br. 22-29. That was the argument to which the government responded in its brief (Gov't C.A. Br. 41-45), and that was the argument the court of appeals addressed in its unpublished opinion (Pet. App. 14-15). Although petitioner mentioned the jury instructions in passing, he did not identify the adequacy of the instructions as a matter for the court of appeals to resolve. Pet. C.A. Br. 24-25. The issue therefore is not properly presented for this Court's review. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); accord *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

b. Even had petitioner raised the argument in the court of appeals, the claim would be reviewable only for plain error, as he made no objection in the district court. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Under the plain-error standard, petitioner would be entitled to relief only if he could show a clear or obvious error that both affected his substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner cannot satisfy that standard.

The district court committed no clear or obvious error when it instructed the jury that a police officer who

steals money or property under color of law violates the due process rights of his victims. The district court's instruction was consistent with the decisions of numerous courts of appeals that have upheld 18 U.S.C. 242 convictions for willful deprivation of due process rights in cases in which state officials stole money or property under color of law. See *United States* v. *Alonso*, 740 F.2d 862, 872-873 & n.8 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); *United States* v. *Albert*, 595 F.2d 283, 285 (5th Cir. 1979); *United States* v. *McClean*, 528 F.2d 1250, 1255-1256 (2d Cir. 1976). Petitioner can cite no criminal case in which a court of appeals has reached a contrary conclusion to that authority. Thus, even if *Parratt* and *Hudson* cast doubt on those cases, the district court did not commit "obvious" error. *Olano*, 507 U.S. at 734.

c. Petitioner would not be entitled to relief even if the jury instructions concerning the Fourteenth Amendment were clearly erroneous. Petitioner was charged with violating 18 U.S.C. 242 by depriving persons of rights guaranteed by the Fourth Amendment, as well as the Fourteenth Amendment. Petitioner does not dispute that, as the district court instructed the jury, a police officer acting under color of law violates the Fourth Amendment when he: (1) obtains a search warrant based on information he knows to be false; (2) seizes property without a warrant; or (3) seizes property "without legitimate law enforcement purpose." 12/10/04 Trial Tr. 1616. If the jury found a defendant guilty of taking money or property from an individual and converting it to his own use, in accordance with the judge's instructions on the procedural due process theory, *id.* at 1616-1618, then it also necessarily found that defendant guilty of seizing money or property "without legitimate law enforcement

purpose" under the Fourth Amendment instructions. And the evidence overwhelmingly established that petitioner's co-conspirators falsified warrants, knowingly executed illegal searches, and took suspects' property in furtherance of the conspiracy. As a member of the conspiracy, petitioner is liable for those acts under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). See pp. 9-10, *infra*. Petitioner thus cannot establish that any error with respect to the Fourteenth Amendment instructions affected his substantial rights or seriously affected the fairness of the proceedings. Cf. *Johnson*, 520 U.S. at 467; *United States* v. *Cotton*, 535 U.S. 625, 633 (2002).

d. Petitioner argues in the alternative that he had no "fair warning" of the range of conduct forbidden by 18 U.S.C. 242, and thus should be accorded "good faith immunity" from prosecution. Pet. 15 (citing *United States* v. *Lanier*, 520 U.S. 259, 270 (1997)). Petitioner's argument lacks merit. It is clearly established that searching suspects on the basis of false warrants and stealing property from them violates the suspects' constitutional rights, and petitioner thus had fair warning that his conduct subjected him to liability under 18 U.S.C. 242. See *Lanier*, 520 U.S. at 270.

2. Petitioner argues (Pet. 15-20) that the district court constructively amended the indictment by instructing jurors (12/10/04 Trial Tr. 1640-1641) that he could be held responsible for the substantive civil rights violations committed by his co-conspirators if those crimes were reasonably foreseeable consequences of acts committed in furtherance of the conspiracy. See *Pinkerton*, 328 U.S. 640. The court of appeals correctly concluded that the *Pinkerton* charge did not constructively amend the indictment, and its unpublished ruling

does not conflict with any decision of this Court or of any other court of appeals. This Court's review of this issue is therefore not warranted.

As the court of appeals noted (Pet. App. 17), the indictment clearly charged petitioner with both substantive violations of 18 U.S.C. 242 and conspiracy to deprive individuals of constitutional rights under 18 U.S.C. 241. See Pet. App. 43-47. And, as the court of appeals correctly concluded, "[t]he *Pinkerton* charge did not subject [petitioner] to liability for any crime other than § 242, it merely supplied another basis on which liability for this offense might be determined." *Id.* at 17. The courts of appeals have uniformly agreed that *Pinkerton* liability need not be charged in the indictment before the jury may receive a *Pinkerton* instruction, as an indictment need not "contain the specific theory of law which the prosecution intends to use in its attempt to convict the defendant." *United States* v. *Galiffa*, 734 F.2d 306, 314 (7th Cir. 1984); see *United States* v. *Washington*, 106 F.3d 983, 1011 (D.C. Cir.), cert. denied, 522 U.S. 984 (1997); *United States* v. *Thirion*, 813 F.2d 146, 152 (8th Cir. 1987); *United States* v. *Roselli*, 432 F.2d 879, 894-895 & n.27 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971).

Contrary to petitioner's assertion (Pet. 18-20), the court of appeals' decision creates no conflict with *United States* v. *Pedigo*, 12 F.3d 618 (7th Cir. 1993). In *Pedigo*, the defendant was charged with (1) one count of possession of marijuana with intent to distribute; (2) knowingly using a firearm during and in relation to that substantive offense; and (3) conspiring with others to distribute marijuana. Even though the indictment, on its face, permitted conviction on the firearm charge only upon a finding that a firearm was used during and in relation to

the *substantive offense*, the district court nevertheless instructed the jury that the defendant could be found liable on the firearm charge if his co-conspirator used a firearm in furtherance of the *conspiracy*. The Seventh Circuit held that this was error. *Id.* at 631. In this case, by contrast, the *Pinkerton* charge directly tracked the substantive offenses and conspiracy charge contained in the indictment.

In any event, the question is of limited significance in this case, since, as the court of appeals held, "there was sufficient evidence to support a rational jury finding that [petitioner] himself engaged in the criminal violation of civil rights under § 242." Pet. App. 17.

3. Petitioner contends (Pet. 20-21) that his conviction for using or carrying a firearm during or in relation to the conspiracy to deprive persons of their constitutional rights may have been duplicative of his convictions for using or carrying a firearm during or in relation to the two substantive rights violations, and should therefore have been dismissed on double jeopardy grounds. Petitioner's argument is without merit.

Petitioner did not preserve his objection before the district court, nor did he request a jury instruction that would limit the jury's consideration of the conduct that would support the firearms conviction he now challenges. Pet. App. 16. As the court of appeals correctly held, the district court committed no reversible error. *Ibid.* As the court of appeals observed, "the conspiracy involved broader conduct than the substantive [Section 242] offenses]." *Id.* at 16-17. The jury heard evidence that petitioner joined in a conspiracy to deprive persons of their civil rights over several years, including incidents that did not form the basis for the substantive violations, during which firearms were used. The court

of appeals correctly concluded that the jury "could have reasonably convicted on this conduct." *Id.* at 17.

4. Petitioner asserts (Pet. 21-23) that the district court committed reversible plain error when it instructed the jury that the "use, attempted use or threatened use of a dangerous weapon" within the meaning of 18 U.S.C. 242 encompasses "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right." 12/10/04 Trial Tr. 1625. Petitioner contends that this instruction is inconsistent with this Court's holding in *Bailey*, 516 U.S. 137. The court of appeals correctly rejected that contention in its unpublished opinion, and its judgment does not warrant further review.

As the court of appeals noted (Pet. App. 18), the district court's instruction concerning the "use" of a weapon under Section 242 did not end with "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right." The district court further instructed the jury that it should find this element of the offense satisfied "if the dangerous weapon was brandished, displayed, or referred to by the defendant so that the others present knew that the weapon was available if needed during the commission of the deprivation of a constitutional right." 12/10/04 Trial Tr. 1626.

Considering the meaning of the statutory term "use" for purposes of 18 U.S.C. 924(c), this Court held in *Bailey* that "use" "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 516 U.S. at 143. But the Court further noted that "[t]he active-employment understanding of 'use' certainly includes *brandishing*, *displaying*, bartering, striking with, and, most obviously, firing or attempting to fire a fire-

arm. * * * [A] *reference to a firearm* calculated to bring about a change in the circumstances of the predicate offense is a 'use,' just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'" *Id.* at 148 (emphasis added).

Assuming the term "use" carries the same meaning in 18 U.S.C. 242 as it does in 18 U.S.C. 924(c), the district court's instructions, taken as a whole, are consistent with *Bailey*'s "active employment" definition of "use." Under *Bailey*, brandishing, displaying, and referring to a firearm are all "uses" within the meaning of the statute. The district court did not err when it so instructed the jury.

5. Finally, petitioner contends (Pet. 23-30) that neither a deprivation of rights under color of law (18 U.S.C. 242) nor a conspiracy to deprive a person of rights (18 U.S.C. 241) can qualify as a predicate "crime of violence" for a conviction under 18 U.S.C. 924(c). The court below correctly rejected that contention, and its ruling does not conflict with any decision of this Court or of any other court of appeals. This Court's review of the issue is therefore not warranted.

Section 924(c) proscribes using or carrying a firearm "during and in relation to any crime of violence." 18 U.S.C. 924(c)(1)(A). The statute defines "crime of violence" as a felony that (1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (2) "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3).

a. Section 242 makes it an offense punishable by not more than one year in prison when any person under

color of law willfully deprives a person of his constitutional or statutory rights. The following clause of the provision further provides that, if "bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire," the defendant shall be fined, imprisoned for a term of not more than ten years, or both. 18 U.S.C. 242.

Petitioner claims (Pet. 27-28) that the additional elements described in the second clause of 18 U.S.C. 242 do not render the offense a "crime of violence" because "bodily injury" may result even without the use of force. Petitioner, however, was not charged with acts resulting in bodily injury. The indictment specifically charged petitioner with willfully stealing property "through the use, attempted use, and threatened use of a dangerous weapon." Pet. App. 44-45. The jury was instructed that the government was required to prove beyond a reasonable doubt that petitioner "used, or attempted to use, or threatened to use the use of a dangerous weapon." 12/10/04 Trial Tr. 1625. And the jury indicated on the verdict form that it found petitioner guilty "on the offense of deprivation of civil rights under color of law through use of a dangerous weapon." Jury Verdict Form 2-3.

As the court of appeals correctly concluded (Pet. App. 7-8), where, as here, a defendant is charged with violating 18 U.S.C. 242 through "the use, attempted use, or threatened use of a dangerous weapon," 18 U.S.C. 242, the offense includes as an element "the use, attempted use, or threatened use of physical force," 18 U.S.C. 924(c)(3)(A). In those circumstances, the Section 242 violation constitutes a predicate "crime of violence" for Section 924(c) charges. The only other court of ap-

peals to have considered the issue has reached the same conclusion. *United States* v. *Williams*, 343 F.3d 423, 434 (5th Cir.), cert. denied, 540 U.S. 1093 (2003).

b. The court of appeals also correctly concluded that a conspiracy to deprive citizens of their civil rights in violation of 18 U.S.C. 241 qualifies as a predicate "crime of violence" for purposes of 18 U.S.C. 924(c) charges. Section 241 proscribes conspiring "to injure, oppress, threaten, or intimidate" a person in the "free exercise or enjoyment" of any federal right or privilege.

Petitioner asserts (Pet. 25-26) that because a person may violate Section 241 without using force, it cannot be a "crime of violence" for purposes of Section 924(c). Petitioner supports its contention by identifying cases from this Court in which Section 241 (or its precursor) was violated without use of physical force violence. Pet. 25-26. This argument, however, ignores the plain language of Section 924(c), which identifies crimes of violence as those that, by their nature, involve "a *substantial* risk" that physical force may be used, not a guaranteed risk. 18 U.S.C. 924(c)(3)(B) (emphasis added). As the court of appeals explained (Pet. App. 8), because "applying physical force is perhaps the most obvious way to injure, threaten, or intimidate, a conspiracy to engage in such conduct is, by its nature, a conspiracy that involves a 'substantial risk that physical force' will be used." The only other court of appeals to consider the issue reached the same conclusion. *United States* v. *Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991), cert. denied, 507 U.S. 962 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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